Supreme Court, U.S.
FILED

94 515 SEP 20 1994

No. OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1994

JANET MITCHELL, et al.,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

Edward Tuddenham (Counsel of Record)
Wiseman, Durst, Tuddenham and Owen
1004 West Ave.
Austin, Texas 78701
(512) 479-5017

Tim Hoffman
Hoffman, Sheffield & Sauceda
1008 S. Madison
Amarillo, Texas 79101

QUESTIONS PRESENTED FOR REVIEW

1. Whether the death of a patient as a direct result of a public hospital's intentional custom and practice of allowing nurse anesthetists to illegally practice medicine and its intentional concealment of that fact from patients is sufficiently "shocking to the conscience" to violate substantive due process.

> This question asks the Court to give meaning to the "shock the conscience" standard for substantive due process claims set forth in *Collins v. City of Harker Heights*, Tex., 503 U.S.___, 112 S. Ct. 1061 (1992).

2. Whether allegations that a public hospital deliberately concealed its custom and practice of allowing nurse anesthetists to illegally practice medicine illegally causing the death of a patient states a procedural due process violation.

PARTIES TO THE PROCEEDINGS

Counsel of record certifies that the following listed persons have a direct interest in this case:

Petitioners/Plaintiffs

1. Janet Mitchell on behalf of herself, the estate of Mike Mitchell, deceased, and her minor children Valerie Nicole Mitchell and Clayton Lee Mitchell.

2. Dale Mitchell, father of Mike Mitchell, deceased.

Respondents/Defendants

1. Amarillo Hospital District doing business as Northwest Texas Hospital.

2. Raymond A. Martin, M.D. individually and in his capacity as Director of the Department of Anesthesia of Amarillo Hospital District.

3. Raymond A. Martin, M.D., P.A.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

1. *The Standard For Pleading A Substantive Due Process Violation Is In Need Of Clarification* 7

2. *This Court Has Criticized The Shock The Conscience Standard* 13

3. *This Case Provides An Opportunity To Clarify And Give Content To Substantive Due Process Analysis In Non-Custodial Settings* 14

4. *The Importance of the Procedural Due Process Claim In This Case Calls For Review Of That Claim By This Court* 19

CONCLUSION 20

TABLE OF AUTHORITIES

Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), *cert denied*, 489 U.S. 1065 (1989) 8, 14, 16

Baker v. McCollan, 443 U.S. 137 (1979) 9

Boddie v. Connecticut, 401 U.S. 371 (1971) 13

Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990) 14

Collins v. City of Harker Heights, Tex., 503 U.S. ___, 112 S.Ct. 1061 (1992) . . passim

Cornelius v. Town of Highland Lake, Ala., 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) 7, 12

Daniels v. Williams, 474 U.S. 327, 332 (1986) 7, 9, 19

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 7, 10, 16, 28

Doe v. Taylor I.S.D., 15 F.3d 443 (5th Cir. 1994) (en banc) 12

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) . 16

Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993) 10

Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994)(en banc) 9, 15

Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992)(en banc), cert. denied, ___ U.S. ___, 113 S.Ct. 1264 (1993) 11

Herrera v. Collins, ___U.S.____, 113 S.Ct. 853 (1993) 14

Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133 (2d Cir. 1994) 10

Irvine v. California, 347 U.S. 128 (1953) 13

L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) 10

Leffall v. Dallas I.S.D., 28 F.3d. 521 (5th Cir. 1994) 11

Monahan v. Dorchester Counseling Center, Inc. 961 F.2d 987 (1st Cir. 1992) 11

Nishiyama v. Dickson Co., Tenn., 814 F.2d 277 (6th Cir. 1987) (en banc) . . . 8, 16

Paul v. Davis, 424 U.S. 693 (1976) 9

Rochin v. California, 342 U.S. 165 (1952) 13

Ross v. U.S., 910 F.2d 1422 (7th Cir. 1990) 7, 15

Searles v. SEPTA, 990 F.2d 789 (3d Cir. 1993) 11

Thomas v. Pate, 493 F.2d 151 (7th Cir.) vacated and remanded on other grounds sub nom. *Cannon v. Thomas*, 419 U.S. 813 (1974) (per curiam) 18

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) *cert. denied*, 498 U.S. 938, ... 8, 11, 16

Zinermon v. Burch, 494 U.S. 113 (1990) 19, 20

STATUTES & MISCELLANEOUS

Federal Controlled Substances Act, 21 U.S.C. §§ 829, 841 (1988) 5

Food Drug and Cosmetics Act, 21 U.S.C. § 353 (1988) 5

Tex. Rev. Civ. Stat. Ann., Art. 4495b §3.06(d)(3) . . . 5

Tex. Rule Civ. Pro. 91 4

Restatement (2d) Torts (1965) 12

No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1993

JANET MITCHELL, et al.,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

OPINIONS BELOW

The order of the 181st District Court of Texas dismissing petitioners' original petition is not published. It is reprinted in the Appendix at A-41. The May 1993 opinion of the Texas Seventh District Court of Appeals is

published at 855 S.W.2d 857 and appears in the Appendix at A-3. The orders of the Supreme Court of Texas denying petitioners' application for writ of error and motion for rehearing of the application are reprinted in the Appendix at A-1 and A-2.

JURISDICTION

The order of the Texas Supreme Court denying petitioners' motion for rehearing of their application for writ of error was denied on June 22, 1994. This petition was filed within ninety (90) days therefrom and this Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Title 42 of the United States Code, § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises out of the death of Mike Mitchell during surgery at Northwest Texas Hospital (hereafter NWTH), a public hospital operated by Respondent Amarillo Hospital District. Petitioners[1] alleged that NWTH and its Director of Anesthesia, Raymond Martin, M.D., knowingly allowed and encouraged anesthesia nurses under their control to practice medicine illegally by allowing such nurses to prescribe and administer deadly anesthetic drugs to patients of the hospital. As a direct result of this custom and practice, a nurse prescribed an improper anesthetic drug for use during Mike Mitchell's surgery causing his death. Petitioners filed this action pursuant to 42 U.S.C. § 1983 alleging that the actions of the hospital and Martin deprived Mike Mitchell of his life in violation of his rights to both substantive and procedural due process. Petitioners also

---

[1] Petitioner Janet Mitchell brings this action individually, as representative of the estate of Mike Mitchell, and as next friend for her minor children Valerie Nicole Mitchell and Clayton Lee Mitchell. Petitioner Dale Mitchell, father of Mike Mitchell, deceased, was also a plaintiff below.

alleged various state tort claims.[2]

The district court dismissed petitioners' civil rights claims on the pleadings[3] and granted summary judgment against petitioners' state law claims. On appeal, the Seventh District Court of Appeals held that the actions of Respondents NWTH and Martin were taken under color of state law, but rejected petitioners' substantive due process claim because petitioners' allegations could not "be characterized as arbitrary or conscience shocking, in a constitutional sense." *Mitchell*, 855 S.W.2d at 869, *citing to Collins v. Harker Heights*, 503 U.S. ____, 112 S.Ct. 1061, at 1070 (1992). According to the court, "the Mitchells are attempting to turn a medical malpractice tort case into a section 1983 claim." *Id.* at 869. The court also rejected petitioners' procedural due process claim on the grounds that petitioners "alleged common law negligence, not the deprivation of a constitutionally protected life, liberty, or property interest." *Id.* at 871. The Texas Supreme Court denied petitioners application for writ of error.

The Mitchells' pleading, which is reprinted in the Appendix at A-49 , alleges the following facts which must be accepted as true:

1. Mike Mitchell was admitted to NWTH in February 1987 because of fluid collecting around his

---

[2] The nurse who injected the anesthetic and the operating surgeon were named as defendants in the case as originally filed. The claims against them were settled.

[3] Respondents filed special exceptions pursuant to Tex. R. Civ. P. 91, alleging that petitioners' pleading failed to state a cause of action under 42 U.S.C. § 1983. The trial court granted the special exceptions and then dismissed the claims when petitioners chose not to replead.

heart and was immediately scheduled for surgery. Nurse James Adamson was assigned to perform anesthesia for the operation. Petition, ¶¶ 1-17.

2. Because of the recognized dangers of anesthetic drugs, both state and federal law prohibit them from being dispensed except on the prescription of a licensed physician. Texas Health and Safety Code Ann. § 481.074 (West 1992); Food, Drug and Cosmetic Act, 21 U.S.C. § 353 (1988); Federal Controlled Substances Act, 21 U.S.C. §§ 829, 841 (1988). Nurses may administer anesthesia but only under the supervision of a physician. Tex. Med. Prac. Act, Tex. Rev. Civ. Stat. Ann. Art. 4495b § 3.06(d)(3). In order to appear to be in compliance with these laws, Martin, as policy maker for the Department of Anesthesia, adopted a policy that the operating surgeons were to be medically responsible for the actions of nurse anesthetists. However, neither NWTH nor Martin had any intention of carrying out this policy. Neither NWTH nor Martin communicated the policy to the operating surgeons. Moreover, NWTH and Martin knew or should have known that the surgeons were not competent to supervise anesthesia practices. Petition, ¶¶ 18-27, 56-63.

3. As a result of Respondents' failure to communicate the anesthesia policy, it was the persistent and widespread custom and practice for nurses at NWTH to prescribe and administer prescription anesthetic drugs to patients without the supervision of a licensed physician. Respondent Martin, who was charged with the overall medical supervision of nurse anesthetists at the hospital, was

aware of this widespread practice and aware that it posed obvious, substantial and unjustifiable risks of injury and death to patients at NWTH. Despite this awareness, Martin allowed the practice to continue. Petition, ¶¶ 28, 57, 64-67.

4. As a result of NWTH's and Martin's actions, nurse Adamson, acting completely on his own, proceeded to prescribe anesthetic drugs for Mike Mitchell's surgery that caused Mitchell's death. Petition, ¶¶ 30-33.

5. No one at NWTH informed Mitchell that a nurse would be illegally prescribing anesthetic drugs during his surgery and Mitchell did not voluntarily submit to such care. The anesthesia consent form signed by Mitchell fraudulently represented, expressly and impliedly, that Nurse Adamson would be acting in conformance with the law. Petition, ¶¶ 36-40.

6. When Mitchell was taken to surgery he was completely dependent upon NWTH for his care and NWTH assumed control of his very existence. Petition, ¶ 36.

7. The intentional actions of NWTH and Martin manifested deliberate indifference to Mitchell's constitutionally protected right to life and liberty and constituted conduct shocking to the conscience in violation of his right to substantive and procedural due process. Petition, ¶¶ 50-54, 75-80.

REASONS FOR GRANTING THE WRIT

1. *The Standard For Pleading A Substantive Due Process Violation Is In Need Of Clarification*

The Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, ___U.S. ___, 112 S.Ct. 1061, 1068 (1992). In *Daniels v. Williams*, 474 U.S. 327 (1986), the Court began to define those guideposts by making clear that the Due Process Clause is not implicated by negligent conduct. The Court reserved the question of whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of due process. *Id.* at 334 n.3. In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Court provided another guidepost by making clear that the Due Process Clause imposed no affirmative duty on government to protect the safety of individuals in a non-custodial setting. The Court indicated in dicta, however, that the state may have some responsibility where it plays a role in the creation of a dangerous situation or renders an individual more vulnerable to harm. *Id.* at 201.

In the wake of *Daniels* and *DeShaney*, several of the Circuit Courts of Appeals found that deliberate indifference on the part of government to dangers created by its actions violates the substantive component of the Due Process clause, even in non-custodial settings. *See, e.g., Ross v. U.S.*, 910 F.2d 1422, 1433 (7th Cir. 1990)(county policy which precluded bystanders from attempting to rescue drowning child manifested such disregard for life as to violate due process); *Cornelius v. Town of Highland Lake,*

Ala., 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) (town officials' indifference to dangers created by felons used as work crew around town hall violated substantive due process rights of town clerk kidnapped by two members of the work crew); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, (1990) (state trooper's deliberate indifference to safety of woman abandoned by the officer in a high-crime area after the officer arrested the driver of the car in which the woman was travelling violated her substantive due process rights); *Nishiyama v. Dickson Co., Tenn.*, 814 F.2d 277, 282-83 (6th Cir. 1987) (en banc) (sheriff's reckless indifference to dangers posed by allowing a convicted felon "trusty" to drive a patrol car violated the substantive due process rights of motorist pulled over and murdered by the trusty). *See also Archie v. City of Racine*, 847 F.2d 1211, 1218-19 (7th Cir. 1988)(en banc) (suggesting in dicta that criminal deliberate indifference, as opposed to the more lenient standard of civil deliberate indifference violates substantive due process), *cert. denied*, 489 U.S. 1065 (1989).

In 1992 this Court rejected the notion that deliberate indifference to safety, standing alone, was sufficient to establish a substantive due process violation in a non-custodial setting. In *Collins*, 503 U.S. at ____, 112 S.Ct. at 1061, a case involving allegations that the city's deliberate indifference to the safety of its sewer workers caused the death of one of it employees, the Court stated that only state action which "can properly be characterized as arbitrary or conscience shocking in the constitutional sense" rises to the level of a substantive due process violation. *Id.* at 1070. The *Collins* decision did not elaborate on the content of the "shock the conscience" standard except to note that Collins' claim was "analogous to a fairly typical state law tort claim." The Court explained that,

> [b]ecause the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels v. Williams*, 474 U.S. at 332, we have previously rejected claims that the Due Process clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, *see, e.g., id.*, at 332-333; *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693 (1976).

Collins, 112 S.Ct. at 1070.[4]

In the wake of *Collins* lower federal and state courts have struggled to give meaning to the "shock the conscience" standard. A sharply divided Third Circuit, sitting en banc has held that the "shocks the conscience" standard is the proper one for substantive due process claims in non-custodial settings while "reckless disregard/gross negligence" is the proper standard for individuals in state custody. *Fagan v. City of Vineland*, 22 F.3d 1296, 1304-1306 (3d Cir. 1994)(en banc). The majority opinion did not offer any definition of the "shock the conscience" standard and conceded that it was an "amorphose and imprecise" inquiry. *Id.* 22 F.3d at 1308. The dissenting judges argued that

---

[4] This was the first time the Court included torts involving deliberate indifference -- a species of intent -- as among those analogous to state law torts which did not rise to a constitutional level. The quoted language about "injuries that attend living together in society" was used in *Daniels* to refer to negligent conduct. Of the three cases cited by the Court, two, *Daniels* and *Baker*, clearly involved mere negligence. The third, *Paul*, 424 U.S. at 693, does not explicitly state that it was a case of negligence, but nothing in the Court's opinion suggests otherwise.

"reckless indifference" is the proper minimum standard for all substantive due process cases. *Id.* at 1320-27. The dissent noted that *Collins* referred to two standards, i.e. arbitrary action and conscience-shocking action. *Id.* at 1314. Since "reckless conduct constitutes an arbitrary act" the dissent reasoned that such recklessness should be sufficient to state a substantive due process claim. *Id.* at 1325.

The Second Circuit has also noted the possible distinction between *Collins*' reference to "conscience-shocking" and "arbitrary" state action. *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994). Although the circuit court did not decide which standard applied, the court indicated that "arbitrary" action was a "less stringent" standard. *Id.* In another post-*Collins* substantive due process case, the Second Circuit made no reference to the *Collins*' standard at all. *Dwares v. City of New York*, 985 F.2d 94, 98-100 (2d Cir. 1993). Instead the court returned to the language of *DeShaney*, noting that allegations that the police had made the plaintiff "more vulnerable to" injury by encouraging "skinheads" to assault the plaintiffs was sufficient to state a substantive due process violation. *Id.* at 99.

In *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), the Ninth Circuit held that a prison nurse who was raped by her inmate assistant alleged a substantive due process claim against her employers for their deliberate indifference in assigning a rapist to work with her. The Court distinguished *Collins* because "[u]nlike *Collins*, L.W. alleges that the Defendants took affirmative steps to place her at significant risk, and that they knew of the risks." *L.W.*, 974 F.2d at

122-23. Based on this dubious distinction,[5] the court applied the same deliberate indifference standard it had used in *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989), a pre-*Collins* case. *Id.* at 122-3.

Other courts, such as the Fifth and Eighth Circuits, have also ignored the "shocks the conscience" test in post-*Collins* cases and have continued to apply a "deliberate indifference" standard to evaluate whether, in a non-custodial setting, state-created dangers violate substantive due process protections. *See, e.g., Leffall v. Dallas I.S.D.*, 28 F.3d. 521, 530-32 (5th Cir. 1994) (school district decision to sponsor dance at high school despite warnings that the school was not safe at night did not state substantive due process claim because school's actions were negligent, not deliberately indifferent); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992)(en banc) (actions of police officers in leaving drunks in car did not state substantive due process claim because officers did not manifest deliberate indifference), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1265 (1993).

The First Circuit also ignored the "shock the conscience" standard in *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 993 (1st Cir. 1992). Instead, it devised its own test indicating that a substantive due process violation requires, in addition to deliberate indifference, some "coercive exercise of government power which either forcefully restrained a party from protecting himself from

---

[5] Mrs. Collins claimed that the city was on notice of the dangers posed by its sewers when it sent her husband into the sewer. *Collins*, 112 S.Ct. at 1064 n. 1. *See Searles v. SEPTA*, 990 F.2d 789, 793 (3d Cir. 1993)(refusing to distinguish *Collins* on grounds that city in *Collins* was unaware of danger or did not affirmatively create danger.).

harm or restrained others from protecting him" in addition to deliberate indifference to safety. In reaching this conclusion the court disagreed with the Eleventh Circuit's decision in *Cornelius*, 880 F.2d at 348, a pre-*Collins* case which found that a town's deliberate indifference to the dangers posed by using violent inmates to clean the townhall grounds violated the substantive due process rights of a town clerk abducted by the inmates.

The Amarillo Court of Appeals in this case seized on the statement in *Collins* that petitioner's claim was "analogous to a fairly typical state law tort claim", 112 S.Ct. at 1070, as a means of defining "conscience shocking." *Mitchell*, 855 S.W.2d at 869. The court apparently read *Collins* as holding that any allegations which are analogous to state law tort claims are, by definition, not "conscience shocking." The problem with this distinction is that most, if not all, recognized constitutional violations are analogous to common law torts. *See Doe v. Taylor I.S.D.*, 15 F.3d 443, 476-479 (5th Cir. 1994)(en banc)(Jones, J., dissenting)(arguing that rape of school child by teacher does not violate substantive due process because, *inter alia*, it is a state tort). Assault by a police officer is analogous to common law assault; deliberate indifference to medical needs of prisoners is analogous to the tort of reckless disregard for safety. *See* Restatement (2d) of Torts § 500 (1965). If the statement in *Collins* that "the Due Process Clause should [not] be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law," 112 S.Ct. at 1070, is taken to include all state law torts, even those involving intentional or deliberately indifferent conduct, it is difficult to imagine how a constitutional tort could ever be plead. Plainly, the existence of an analogous common law tort does not, standing alone, give any content to the "shocks the conscience" standard.

2. *This Court Has Criticized The Shock The Conscience Standard.*

The difficulty inherent in applying the "shock the conscience" standard has been recognized by this Court for some time. Justice Douglas criticized the test when it was first enunciated in *Rochin v. California*, 342 U.S. 165 (1952), noting that it "make[s] the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here." *Id.* at 179 (Douglas, J., concurring). Justice Black was more forceful:

> With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.

Boddie v. Connecticut, 401 U.S. 371, 393 (1971). In his concurrence in *Irvine v. California*, 347 U.S. 128 (1953), Justice Clark stated,

> [The shock the conscience test] makes for such uncertainty and unpredictability that it would be impossible to foretell -- other than by guesswork -- just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is

overturned and a guilty man may go free.

Id. at 138 (Clark, J., concurring).

More recently, Justice Scalia called for the dismantling of that test:

> If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences . . . perhaps they should doubt the calibration of their consciences, or better still, the usefulness of 'conscience-shocking' as a legal test.

Herrera v. Collins, ___U.S.____, ____, 113 S.Ct. 853, 875 (1993) (Scalia, J., concurring). Other federal courts have expressed similar reservations about the difficulty of applying a "shock the conscience" standard.[6]

3. *This Case Provides An Opportunity To Clarify And Give Content To The Substantive Due Process Analysis In Non-Custodial Settings*

In light of the difficulties defining a standard as vague

---

[6] *See also, Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990)("The 'shock the conscience' standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court's power to interpret objectively where there is a dearth of previous decisions on which to base the standard. We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity."); *Archie*, 847 F.2d at 1215 (shocks the conscience "is too indeterminate to offer notice to officials of the rules they must follow; it invites retrospective analysis instead of inquiring into the circumstances known at the time of the action; it dwells on imputed intent rather than on the objective circumstances.")

as "shocks the conscience" and the conflicting decisions which have arisen out of this standard, the need for clearer guideposts for analyzing substantive due process claims is obvious.

Collins clearly establishes that something more than deliberate indifference must be shown to establish a substantive due process violation. The question is what that something more is. This case provides an important opportunity to clarify the answer to that question. Petitioners believes that the answer lies not in vague notions of conscience-shocking, but in the other half of the *Collins* formulation, the arbitrariness of government action.

Contrary to the dissenting judges in *Fagan*, 22 F.3d at 1325, deliberate indifference and arbitrariness are not, necessarily, the same thing. Government policies -- such as those in *Collins* -- "involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges." *Collins*, ___U.S. at ____, 112 S.Ct. at 1070. The very same policy choices which appear to manifest deliberate indifference to one group may well serve other important economic and social purposes. Because there is a "presumption that the administration of Government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces," *Collins*, 112 S.Ct. at 1070, it will generally be extremely difficult to establish that programmatic policies (such as those involved in *Collins*) manifest such a total lack of reason as to be arbitrary. *But see Ross*, 910 F.2d at 1422 (policy which precludes bystanders from saving drowning victim violates substantive due process).

In other cases, however, the complete arbitrariness of

government action is apparent. For example, when the risk danger is caused by individual actions rather than general policies -- as was the case in *Ostrander*, 879 F.2d at 583, where the officer abandoned a woman at night in a high crime area, or in *Nishiyama*, 814 F.2d at 277, where the sheriff allowed felons unsupervised use of patrol cars -- the issue of arbitrariness is much easier to assess. In these situations the government is not balancing broad social and economic goals, and its danger creating action is more easily evaluated as senseless and arbitrary. This is perhaps why the Court in *Collins* emphasized the fact that Collins "does not even allege that [her husband's] supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured." *Collins*, 112 S.Ct. at 1069.

A somewhat different test for substantive due process violations was suggested in *Archie v. City of Racine*, 847 F.2d at 1219. In that case the Seventh Circuit focused on the fact that the term "deliberate indifference" is used in both a civil and criminal sense. Criminal "deliberate indifference" requires extreme indifference to the value of human life. It requires a high degree of risk of severe injury and it requires the risk to be so great that the defendant's knowledge of the risk can be inferred. Civil "deliberate indifference" is more akin to recklessness or gross negligence and does not require as extreme a level of indifference. *Id.* at 1211. *See also Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (deliberate indifference to medical needs must rise to the level of criminal deliberate indifference to violate 8th amendment). The concept of criminal deliberate indifference, while not entirely free from ambiguity, is nevertheless a familiar legal concept which courts have experience applying. Such a standard will, no doubt, allow for far greater consistency in application than

vague concepts like "shock the conscience."

Whether criminal deliberate indifference, complete arbitrariness, or some combination of the two are used as a standard, the complaint in this case clearly alleges a substantive due process violation. Petitioners have alleged wholly arbitrary actions on the part of NWTH and Dr. Martin. No conceivable excuse exists for allowing and encouraging nurses to violate federal criminal statutes[7] and assault patients by illegally prescribing deadly drugs for them. The "presumption that the administration of Government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces," *Collins*, 112 S.Ct. at 1070, does not come into play. This is not a case of a programmatic policy which may have dangerous consequences. It is a case of a deliberate choice on the part of the Respondents to violate federal law and allow nurses to assault patients.

Moreover, Petitioners have clearly alleged criminal deliberate indifference, not just civil deliberate indifference. Petitioners specifically allege that Respondents were aware of the grave risks of their actions. But even without that, the dangers inherent in allowing unauthorized persons to prescribe powerful anesthetic drugs are so great, and so likely to result in harm, that Respondents' knowledge of that grave risk can be inferred.

---

[7] The fact that the City in *Collins* violated only state civil law whereas here defendants have violated federal criminal law is not insignificant. On grounds of federalism this Court has consistently shown reluctance to enforce state law against state defendants. On the other hand, when Congress acts to foreclose actions by invoking criminal penalties it does so as a co-equal branch of government.

This case presents one other critical factor which Petitioner believe is critical to substantive due process analysis: the State's role in limiting the ability of those not in custody to protect themselves. The Court made clear in *DeShaney* that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide his basic human needs -- *e.g.* food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." 489 U.S. at 200. For this reason pre-trial detainees and convicted prisoners have a constitutional right to minimally adequate medical treatment. But actual custody is not the only way in which the state can limit an individual's ability to protect himself from state created dangers. Once Mitchell was admitted to NWTH and taken into surgery, he was no more able to protect himself from the dangers created by Respondents' decision to allow nurses to practice medicine than a similarly situated detainee or prisoner would have been. When the state creates a danger that is unknown and undiscoverable because of government concealment, voluntary patients are no more capable of protecting themselves from state-inflicted injury than involuntary patients. No matter how they got there, once in the operating room the two are in the identical position. It makes no sense to say that a detainee in these circumstances has a constitutional claim for assault by a nurse, but a voluntary patient cannot recover for the very same government action. *See Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir.) *vacated and remanded on other grounds sub nom Cannon v. Thomas*, 419 U.S. 813 (1974)(per curiam) (doctor who knew prisoner was allergic to penicillin but injected him with it anyway is guilty of cruel and unusual punishment).

4. *The Importance of the Procedural Due Process Claim In This Case Calls For Review Of That Claim By This Court.*

Petitioners' alleged that Respondents' violated Mike Mitchell's procedural due process rights by failing to give him notice, prior to surgery, of the hospital's practice of allowing unsupervised nurses to administer anesthesia illegally. The Court of Appeals rejected this claim for much the same reason it rejected petitioners' substantive due process claim: the court apparently believed that because petitioners' claim could be analogized to "the theory of informed consent which is based on negligence," no due process rights could be violated. *Mitchell*, 855 S.W.2d at 871.

Whatever similarities there may be between the theory of informed consent and Petitioners' claim, Petitioners clearly alleged that Respondents obtained Mike Mitchell's consent to anesthesia through knowing, willful, and fraudulent misrepresentations. Petition, ¶ 40. Such deliberate conduct is at the very core of abusive state actions prohibited by the Due Process Clause. *Daniels*, 474 U.S. at 331.

This case is indistinguishable from *Zinermon v. Burch*, 494 U.S. 113 (1990). As in *Zinnermon*, Respondents' knowledge of the grave risks involved in allowing nurses to practice medicine illegally made loss of life highly predictable. Pre-deprivation process was certainly possible. Indeed, that is what the hospital's written consent form was designed to accomplish. The problem was that the hospital misused its consent form, just as the respondents in *Zinermon* misused their voluntary admissions procedures, so that the consent form did not serve its intended purpose. It

should be added that the use of an honest consent form would not have been a futile act as the Court of Appeals suggested. Had Mike Mitchell been informed that an unsupervised nurse would be performing anesthesia illegally, his family would certainly have been in a position to demand proper anesthesia services. Finally, the lack of proper notice in this case cannot be characterized as unauthorized. This is not a case of subordinate employees making misrepresentations to patients. The hospital had the duty and authority to obtain valid consent from patients. According to the complaint, the hospital and its Director of Anesthesia simply chose to abuse their power and fraudulently conceal from patients the fact that the hospital was allowing nurses to practice medicine illegally.

The protections of procedural due process are of fundamental importance in our society and the continued vitality of *Zinermon,* 494 U.S. at 113, should be reaffirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
Edward Tuddenham (Attorney of Record)
Wiseman, Durst, Tuddenham and Owen
1004 West Ave.
Austin, Texas 78701

Tim Hoffman
Mike Sheffield
Hoffman, Sheffield & Sauceda
1008 S. Madison
Amarillo, Texas

APPENDIX

APPENDIX

SUPREME COURT OF TEXAS

June 22, 1994

[Names of Counsel Omitted]

RE: Case No. D-4110

Style: JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, DECEASED; JANET MITCHELL as next friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her minor children; and DALE MITCHELL

v. AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his Official Capacity, JAMES ADAMSON, CRNA, JOHN E.W. BAAY, M.D., individually and d/b/a JOHN E.W. BAAY, M.D.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By: /S/
Mia Zierlein, Deputy Clerk

SUPREME COURT OF TEXAS

March 9, 1994

[Names of Counsel Omitted]

RE: Case No. D-4110

Style: JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, DECEASED; JANET MITCHELL as next friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her minor children; and DALE MITCHELL

v. AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his Official Capacity, JAMES ADAMSON, CRNA, JOHN E.W. BAAY, M.D., individually and d/b/a JOHN E.W. BAAY, M.D.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

/S/
Peggy Littlefield,
Chief Deputy Clerk

Janet MITCHELL, Individually and as Personal Representative and Heir of the Estate of Mike Mitchell, Deceased; Janet Mitchell, as Next Friend of Valerie Nicole Mitchell and Clayton Lee Mitchell, her Minor Children; and Dale Mitchell, Appellants.

v.

AMARILLO HOSPITAL DISTRICT d/b/a Northwest Texas Hospital; Raymond A. Martin, M.D., Individually and in His Official Capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District d/b/a Northwest Texas Hospital; and Raymond A. Martin, M.D., P.A., Appellees.

No. 07-01-0007-CV.

Court of Appeals of Texas,
Amarillo.

May 28, 1993.

Rehearing Overruled July 20, 1993.

Before REYNOLDS, C.J., and BOYD and POFF, JJ.

REYNOLDS, Chief Justice

Janet Mitchell, individually and as personal representative and heir of the estate of Mike Mitchell, deceased, and as next friend of Valerie Nicole Mitchell and Clayton Lee Mitchell, her minor children, and Dale Mitchell (the Mitchells) present a nine-points-of-error attack on the orders entered by the trial court, dismissing their causes of action alleged under 42 U.S.C. § 1983, the United states

Constitution, 21 U.S.C. § 801, *et seq.*, and the Texas Constitution, granting summary judgment, and dismissing their claims for loss of consortium and mental anguish damages allegedly suffered prior to the death of Mike Mitchell. On the rationale to be expressed, we will overrule the points of error and affirm the final judgment of the trial court.

The intricate pattern of the underlying cause, a consolidation of two suits, necessitates an extended narration. The events giving rise to the cause began with Mike Mitchell's admission to Northwest Texas Hospital on 24 February 1987. His cardiologist diagnosed a heart condition known as cardiac tamponade. John E.W. Baay, M.D., Mitchell's surgeon, was contacted and, after reviewing an echocardiogram with the cardiologist, decided that surgery was needed as quickly as possible.

James Adamson, a Certified Registered Nurse Anesthetist (CRNA) employed by the Hospital, was designated to perform the anesthesia services required for surgery. He administered anesthesia which caused cardiac arrest. By the time a physician anesthesiologist was called in, Mike Mitchell had suffered almost total brain damage. Mike Mitchell died on 10 January 1990.

Before his death, Janet Mitchell, individually and as guardian and next friend of Mike Mitchell, incompetent, joined by her minor children, Valerie Nicole Mitchell and Clayton Lee Mitchell, filed a district court action, cause no. 69,391-B, under the Medical Liability and Insurance Improvement Act. Tex.Rev.Civ.Stat.Ann. art. 4590i (Vernon Supp.Pamp.1993). Named as defendants were James Adamson, CRNA (Adamson), John E.W. Baay, M.D., individually and d/b/a John E.W. Baay, a Professional

Association (Baay), and Amarillo Hospital District d/b/a Northwest Texas Hospital (the Hospital). The defendants answered and denied liability.

Later, Raymond A. Martin, M.D., individually and in his official capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District d/b/a Northwest Texas Hospital, and Raymond A. Martin, M.D., a Professional Association (Martin), was named a defendant. Martin filed a general denial.

Subsequently, Janet Mitchell filed her second amended original petition in which she omitted the names, and joinder, of her minor children. In this petition, she alleged that her action was brought pursuant to the laws of the State of Texas, Title 42 sections 1983 and 1988 of the United States Code, and the Fifth and Fourteenth Amendments of the United States Constitution.

On the same day, Janet Mitchell, as next friend of Valerie Nicole Mitchell and Clayton Lee Mitchell, was joined by Dale Mitchell, the decedent's father, to initiate a section action in the district court, cause no. 72,720-B, against Adamson, Baay, the Hospital, and Martin. The Mitchells alleged that this action was brought pursuant to the laws of the State of Texas, Title 42 sections 1983 and 1988 of the United States Code, and the Fifth and Fourteenth Amendments of the United States Constitution.

Answering in cause no. 72,720-B, the Hospital filed special exceptions, a general denial, and interposed as an affirmative defense the limitation of liability under the Texas Tort Claims Act. Tex.Civ.Prac. & Rem.Code Ann. § 101.001 *et seq.* (Vernon 1986 & Supp. 1993). By its answer the Hospital specially excepted to the petition because it

"fails to allege the deprivation of a federally protected right . . . and fails to allege acts or omissions cause Plaintiff's alleged deprivations committed by a person or persons acting under color of state law and therefore does not state a cause of action under 42 U.S.C. 1983." The Hospital also specially excepted to the petition where it alleged, or attempted to allege, claims on behalf of the minor children and Dale Mitchell for "care, maintenance, support, services, advice, counsel, contributions of pecuniary value, love, comfort, companionship and society, emotional pain, torment and suffering, interference with the familiar relationship, loss of inheritance, grief, and bereavement." The Hospital asserted that no facts were alleged in the petition which would allow for recovery of such damages under Texas law; thus, the petition failed to state a cause of action for such damages.

Similarly, the Hospital filed special exceptions to the amended petition in cause no. 69,931-B, pointing out with particularity that the Mitchell's petition did not state a cause of action under 42 U.S.C. § 1983. The Hospital also specially excepted to the petition where it alleged, or attempted to allege, claims on behalf of Janet Mitchell for "mental pain, anguish, suffering, or emotional injury of any kind." The Hospital asserted that Janet Mitchell had not alleged any facts which would allow for her recovery of such damages under Texas law; therefore, her petition failed to state a cause of action for such damages.

Following a hearing, the trial court signed separate orders in both causes. By its order in cause no. 72,720-B, the court sustained the special exceptions to the claims for relief under 42 U.S.C. § 1983 and for damages sought by the minor children and Dale Mitchell for care, maintenance, support, services, advice,counsel, contributions of pecuniary

value, love, comfort, companionship and society, emotional pain, torment and suffering, interference with the familial relationship, loss of inheritance, grief, and bereavement. By its order in cause no. 69-391-B, the court also sustained the special exceptions to Janet Mitchell's claims for relief under 42 U.S.C. § 1983 and her claims for damages, except for her claim for loss of comfort, companionship and society.

Afterwards, Martin filed motions for summary judgment in both causes. Martin claimed entitlement to judgment as a matter of law on two grounds. First, he was contractually bound by an employment agreement from 1 December 1986 to 1 January 1987, but when confronted with the prospect of extending the terms and conditions of his contract from 1 January 1987 to 1 March 1987, he declined; consequently, although he continued to schedule anesthesia from 1 January 1987 until November of 1987, he was not a party to the contract in question and was only an administrative scheduler. Second, he was not on call during the evening when Mike Mitchell's surgery was performed; therefore, he did not enjoy a doctor-patient relationship with Mike Mitchell on or before his surgery. Hence, Martin declared there was no genuine issue of material fact upon which a cause of action against him could be proved.

The Mitchells responded, urging issues of material fact existed. The facts were whether Martin was acting in his official capacity at the Hospital on 24 February 1987, and concerning the duty Martin owed to Mike Mitchell under the circumstances regardless of the existence of a doctor-patient relationship.

Following the death of Mike Mitchell, the pleadings in both causes were amended to allege causes of action under the wrongful death statute in sections 71.001-.011 of the

Texas Civil Practice and Remedies Code Annotated (Vernon 1986), and the survival statute at section 71.021 of the Civil Practice and Remedies Code Annotated (Vernon 1986). Purportedly, the Mitchells realleged their cause of action under 42 U.S.C. § 1983 and their claims for damages allegedly suffered between 24 February 1987 and 10 January 1990. Filing motions to strike and dismiss these claims in both causes, Martin and the Hospital maintained that the amended pleadings indicated the Mitchell's choice to stand by their previous pleadings.

Upon entering its order consolidating the two actions into cause no. 69,391-B, the court signed an order dated 1 June 1990 dismissing the Mitchells' cause of action against the Hospital for civil rights violations under 42 U.S.C. § 1983. By its order, the claims of the minor children and Dale Mitchell for damages occurring prior to the death of Mike Mitchell were stricken. Also struck were the claims of Janet Mitchell in her individual capacity for damages occurring prior to her husband's death, except for her claims for loss of household services and loss of consortium. The court signed an identical order in favor of Martin on 10 July 1990.

Following the appointment of a guardian ad litem to represent the interests of the minor children, the Mitchells filed their First Amended Petition After Consolidation. The guardian ad litem adopted this pleading as his original petition. In this petition, the Mitchells pleaded that they were not making a claim against the Hospital under the Texas Tort Claims Act, *supra*. For causes of action against the Hospital, the Mitchells alleged that its illegal actions and omissions constituted negligence and negligence per se, were a proximate cause and moving force behind the injuries and death of Mike Mitchell, and were proximate cause and

moving force behind their serious injuries and resulting damages.

For their third cause of action against the Hospital, the Mitchells alleged that its actions "manifested deliberate indifference to Plaintiffs' constitutionally protected rights and constituted conduct shocking to the conscience in violation of plaintiffs' substantive rights under the 5th and 14th Amendments to the United States Constitution and Art. 1 § 13 and § 19 of the Texas Constitution not to be deprived of life and liberty without due process of law." The deliberate indifference on the part of the hospital, they continued, was a proximate cause and moving force behind the injuries and death of Mike Mitchell and their serious injuries and damages. Relief, the Mitchells claimed, was afforded by the Texas Constitution and 42 U.S.C. § 1983.

As their fourth cause of action against the Hospital, the Mitchells alleged that "[t]he policies, custom and practice of [the Hospital] . . . deprived Plaintiffs of their rights to procedural due process under the 5th and 14th Amendments to the United States Constitution and Art. 1 § 13 and § 19 of the Texas Constitution ." They stated the procedural due process violations were a proximate cause and moving force behind their serious injuries and damages. Relief was predicated on 42 U.S.C. § 1983.

Presenting their fifth and sixth causes of action, the Mitchells pleaded that the illegal actions and omissions of Martin, individually and in his official capacity as Medical Director of the Department of Anesthesia of the Hospital, constituted negligence and negligence per se, and were a proximate cause and moving force behind the injuries and death of Mike Mitchell and their serious injuries and damages. For their seventh and eighth causes of action, the

Mitchells alleged that Martin's actions, individually and in his official capacity, constituted deliberate indifference in violation of plaintiffs' substantive rights and that his actions violated plaintiffs' procedural rights. Relief was sought pursuant to the Texas Constitution and 42 U.S.C. § 1983.

The Mitchells alleged as their ninth cause of action that the Hospital and Martin, acting under color of state law, deprived them of their rights under the Federal Controlled Substances Act. 21 U.S.C. § 801, *et seq.* The violations of the Act, they said, were a proximate cause and moving force behind the injuries and death of Mike Mitchell, as well as the serious injuries and damages suffered by them, for which they claimed relief under the Texas Constitution and 42 U.S.C. § 1983. Their final cause of action alleged that the actions and omissions of Adamson and Baay constituted negligence and that their negligence was a proximate cause of plaintiff's damages.

Finally, the Mitchells alleged that as a direct and proximate cause of defendants' negligence, illegal actions and deliberate indifference, "Mike Mitchell was caused to enter a persistive vegetative state on February 24, 1987, in which state he remained until his death on January 10, 1990." The Mitchells sought damages occurring during this interim for loss of consortium, mental anguish and interference with constitutionally protected familial relationships.

Again filing special exceptions, the Hospital asserted that as a matter of law, it was a political subdivision of the State of Texas under article 9, section 4, *et seq.* of the Texas Constitution and articles 4494n and 4494q of the Revised Civil Statutes Annotated (Vernon 1976), rather than a municipal corporation of Amarillo, Potter County, Texas.

By reason of this status, the Hospital professed it was immune from liability under the doctrine of governmental immunity except for such causes of action within the waiver of immunity by the Texas Tort Claims Act. Because no claim was made under the Texas Tort Claims Act, the Hospital reasoned that the Mitchells' pleadings did not state causes of action upon which any relief could be granted under Texas law.

The Hospital also specifically excepted to the Mitchells' petition because it did not state a cause of action under 42 U.S.C. § 1983. In this regard, the Hospital particularly pointed out the Mitchells' failure to allege facts showing that a person was acting under color of law, and the failure to allege the deprivation of a federally protected right by the abuse of governmental power.

Additionally, a special exception was lodged to the Mitchells' allegations of violations of the Texas Constitution. The allegations did not state a cause of action, the Hospital asserted,, since the Texas Constitution does not establish any private cause of action.

Finally, special exceptions were leveled to the Mitchells' ninth-cause-of-action allegation of the violation of the Federal Controlled substances Act, *supra*, and their first-cause-of-action allegations of violations of the Texas Controlled Substances Act, Tex. Health & Safety Code Ann. §§ 481.002, *et seq.* (Vernon 1992); the Texas Dangerous Drug Act, Tex. Health & Safety Code Ann. §§ 483.001, *et seq.*. (Vernon 1992); the Texas Pharmacy Act,

Tex.Rev.Civ.Stat.Ann. art. 4542a-1 (Vernon Supp.Pamp. 1993); and the Texas Medical Practice Act, Tex.Rev.Civ.Stat.Ann. art. 4495b (Vernon Supp.Pamp. 1993). These statutes, the Hospital said, did not grant a private cause of action for a violation.

At the conclusion of a hearing to consider Martin's motion for summary judgment and the special exceptions filed by the Hospital, which Martin adopted in his supplemental answer to the Mitchells' first amended petition after consolidation, the trial judge announced in open court his ruling that the special exceptions were granted. Counsel for the Mitchells and the guardian ad litem then declared that they elected to stand upon their pleadings.

On 19 September 1990, the court rendered a take-nothing judgment as to the Mitchells' alleged causes of action against Martin, individually and in his official capacity, and against Martin, M.D., P.A. The court did not specify the ground(s) for its rendition.

On the same day, the court rendered a judgment eliminating the previous joinder of Adamson and Baay, since the Mitchells had settled their claims against them. The court severed the claims and, as to Adamson and Baay, the judgment became final, *Grossenbacher v. Burket*, 427 S.W. 2d 595, 596 (Tex. 1968), and they are not parties to this appeal.

By an order signed on 7 November 1990, the court disposed of the Mitchells' remaining claims. Specifically, the court decreed that "all of Plaintiffs' claims against Defendant Amarillo Hospital District and their remaining claims against the Martin Defendants be and the same are hereby. DISMISSED."

The Mitchells perfected this appeal to the prosecute their claims against the Hospital and Martin on nine points of error. Points one through six address the trial court's 7 November 1990 order, which dismissed their section 1983 claims for denial of rights under the United States Constitution, the Federal Controlled Substances Act and the Texas Constitution. With their seventh and eighth points, the Mitchells challenge the 19 September 1990 take-nothing summary judgment in favor of Martin. By their final point, they attack the 10 July 1990 order of dismissal of their claims for damages against Martin, and the 1 June 1990 order of dismissal of their claims for damages against the Hospital.

At the outset, we observe that the Mitchells' appeal is from the 7 November 1990 order. That order became the final judgment sinceit disposed of all of the remaining parties and issues, thereby merging into it the orders of June 1, July 10, and September 19. *H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963).

Initially, the Mitchells contend the trial court erred in granting special exceptions and striking their allegations that the Hospital and Martin acted under color of state law for purposes 42 U.S.C. § 1983. Of course, when special exceptions are sustained and the pleader elects to stand on his pleadings, the trial court may dismiss the suit if the allegations fail to state a cause of action. *Geochem Lab., Inc. v. Brown & Ruth Lab., Inc.*, 689 S.W.2d 288, 289-90 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.). Pleadings alone constitute the appellate record to be considered in determining the propriety of an order of dismissal for failure to amend. *Garver v. First National Bank of Canadian*, 406 S.W.2d 797, 799 (Tex. Civ. App. - Amarillo 1966, writ ref'd n.r.e.).

As material in this cause, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

A cause of action under this section involves two essential elements: (1) the conduct complained of was committed by a person acting under a color of state law, and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed. 2d 420 (1981), *overruled on another ground, Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986).

Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit under section 1983. In such circumstances, the defendant's alleged infringement of

plaintiff's federal rights, privileges or immunities is fairly attributable to the state. *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988).

To constitute state action, the deprivation must be caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible, and the party charged with the deprivation must be a person who may fairly be said to be a state actor. State employment is generally sufficient to render the defendant a state actor. A defendant in a section 1983 suit acts under color of state law when he abuses the position given to him by the state. Generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. 487 U.S. at 49-50, 108 S.Ct. at 2255-56.

Thus, our inquiry becomes whether by their live trial pleadings, the Mitchells alleged a cause of action under the color-of-state-law, or state-action, element of 42 U.S.C. § 1983. If the actions of the Hospital and Martin are not considered state action, our inquiry ends. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982).

The Mitchells insist that they have clearly alleged the Hospital acted under color of state law and that "[t]hese allegations are fully supported by the other averments in [their] petition." The Hospital, they propose, is a public hospital district authorized by the laws of the State of Texas and, as such, its actions were necessarily actions under color of state law for purposes of section 1983. In this regard, they rely on *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 174 (5th Cir. 1971), and *Frazier v. Board of Trustees of Northwest Miss.*, 765 F.2d

1278, 1284 n. 9 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2252, 90 L.Ed.2d 697 (1986). They cite *Frazier* for the proposition that as a county hospital, Northwest Texas Hospital was a person, since 42 U.S.C. § 1983 requires a "person" acting under color of law.

The *Sosa* appellant brought suit against the Board of Managers of the Val Verde Memorial Hospital, claiming that the Board had violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in denying him admission to the medical staff of the hospital. The Court recognized that the Val Verde Memorial Hospital was a county institution established pursuant to articles 4478 to 4494r-3 of the Texas Revised Civil Statutes Annotated. The Hospital was construed, maintained and operated with county funds supplemented by federal aid. It was perfectly clear, the court concluded, that the Board of Managers of the Val Verde Memorial Hospital District was a public body receiving both state and federal funds. Thus, its acts were state acts and were required to comport with the provisions of the Fourteenth Amendments. *Sisa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d at 174.

In the present cause, appellants alleged that the Hospital "was a major trauma center rendering medical services and treatment to citizens in a four State area and holding itself out to the public as a fully staffed and professionally operated hospital with the capability of rendering medically acceptable treatment and care to all who enter its facility." They did not allege that the Hospital was maintained or operated with county funds or supplemented by federal aid; but, by its special exceptions, the Hospital acknowledged that for purposes of the Texas Tort Claims Act, it was a political subdivision under article 9, section 4,

et seq. of the Texas Constitution and articles 4494n and 4494q of the Revised Civil Statutes Annotated (Vernon 1976).

Although we are not bound by the decisions of the lower federal courts even though a federal question is involved, *Woodard v. Texas Dept. of Human Resources* 573 S.W.2d 596, 598 (Tex.Civ.App. - Amarillo 1978, writ ref'd n.r.e.), the *Sosa* rationale is applicable and controlling this cause. Under article 4494n, Amarillo Hospital District was created by an act of the state legislature, and the governing body of the City of Amarillo was authorized to levy on all property subject to hospital district taxation a tax not to exceed seventy-five cents on the One Hundred Dollars ($100.00) valuation of all taxable property within the hospital district. Act of May 2, 1956, 55th Leg., R.S.C., Ch. 136, § 2, 1957 Tex.Gen.Laws 298, 299. As a county hospital district receiving public funds, the actions of the Hospital were state acts for purposes of the Fourteenth Amendments. *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d at 174; *Foster v. Mobile County Hospital Board*, 398 F.2d 227, 230 (5th Cir. 1968).

The Fifth Circuit has also held that a hospital district, created under article 4494n, is an independent legal entity in relation to the State. ***Laje v. R.E. Thomason General Hospital***, 6765 F.2d 724, 727 (5th Cir.1982), *reh'g denied*, 670 F.2d 181. By the *Laje* rationale, Amarillo Hospital District is an independent legal entity, not a branch of the State of Texas. As a result, the Hospital is a "person" subject to suit under 42 U.S.C. § 1983 and, the state-action requirement of the Fourteenth Amendment being satisfied, the actions of the Hospital are also actions committed by a "person" under color of law. *West v. Atkins*, 487 U.S. at 49, 108 S.Ct. at 2255.

With respect to Martin, the Mitchells submit that he was sued in his official capacity "for his administrative actions as Medical Director of the Department of Anesthesia." Because he was clothed with the authority of that position at the Hospital, they contend he was able to establish the hospital policies and customs which violated their constitutional rights, and consequently, he also acted under color of state law for purposes of section 1983. In support of their contention, the Mitchells cite *Monte v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), *overruled on another ground, Monnell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 663, 98 S.Ct. 2018, 2022, 56 L.Ed. 2d 611 (1978); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277 (7th Cir. 1986); and *Marin v. Citizens Memorial Hospital*, 700 F.Supp. 354 (S.D. Tex. 1988).

Subsequent to the parties' briefings, the United States Supreme Court held that state officials sued in their individual capacities are "persons" for purposes of 42 U.S.C. § 1983. *Hafer v. Melo*, 502 U.S. ___, ___, 112 S.Ct. 358, 360, 116 L.Ed.2d 301, 108 (1991). In so holding, the Court construed 42 U.S.C. § 1983, an act of Congress, and the construction is binding upon us in the disposition of this appeal. *Winton v. Thompson*, 123 S.W.2d 951, 952 (Tex.Civ.App. - Beaumont 1938, writ ref'd).

The *Hafer* court explained the distinction between official-capacity and personal-capacity actions. An action against a state official in his official capacity, seeking to impose liability payable from public funds in the state treasury, is treated as an action against the state, and in that situation, neither the official nor the state is "person" under section 1983. 502 U.S. at ____, 112 S.Ct. at 362-63, 116 L.Ed.2d at 310. To the contrary, an official, when sued in

an action to impose individual liability upon him for acting under color of state law and causing the deprivation of a federal right, is in court as an individual, and is a "person" within the statutory term. 502 U.S. at ____, 112 S.Ct. at 361-62, 116 L.Ed.2d at 309.

In this cause, Martin was sued in his official capacity as Medical Director of the Department of Anesthesia for the Hospital, individually and in his corporate capacity as a professional association, Without pausing to address whether the action against Martin in his official capacity was a personal- or an official-capacity suit within the rationale of *Hafer*, it suffices that in his individual and corporate capacities, he was a "person" for the purposes of section 1983. The question, then, is whether he was acting under color of state law. ***Hafer v. Melo***, 502 U.S. at ___, 112 S.Ct. at 361-62, 116 L.Ed.2d at 309.

Although Martin testified in his deposition that he did not consider himself an employee of the Hospital, the appellate record reveals this employment agreement: "The Hospital hereby employs the Doctor to furnish to it all services that may be required in organizing, supervising, and operating an anesthesia service for a term of one month commencing on the 1st day of December 1986, through the first day of January 1987." Despite the expiration of the contractual term, Martin's employment continued. Granted that state employment is generally sufficient to render a defendant a state actor, *West v. Atkins*, 487 U.S. at 49, 108 S.Ct. at 2255, Martin was acting under color of state law in his individual and corporate capacities.

Therefore, the trial court erred in granting the special exceptions addressed to, and striking, the Mitchells' allegations that the Hospital and Martin were acting under

color of state law for purposes of section 1983. The first point of error is sustained.

The next question, the subject of the Mitchells' second point, is whether their live trial pleadings alleged the second element of a cause of action under 42 U.S.C. § 1983, i.e., the deprivation of a right, privilege or immunity secured by the Constitution or the laws of the United States. The Due Process Clause of the Fourteenth Amendment, they contend, contains a substantive component that bars certain arbitrary and wrongful government actions regardless of the fairness of the procedures used to implement them. Under this component, a constitutional violation is complete when the wrongful action is taken, and it is actionable under section 1983. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

Under the Mitchells' view, to plead a due process violation against a government entity like the Hospital, it was necessary to allege (1) a municipal policy or custom that (2) when executed or implemented (3) produced a constitutional tort, and (4) caused injury to the plaintiff. *See City of Amarillo v. Langley*, 651 S.W.2d 906, 913 (Tex. App.-Amarillo 1983, no writ). The existence of policies and customs at the Hospital allowed nurse anesthetists to illegally practice medicine, which were pleaded as follows:

14. On and prior to February 24, 1987, there existed at NWTH a policy that NWTH employee nurse anesthetists (CRNAs) rather than anesthesiologists (M.D.s) were to be called to perform anesthesia for surgeries during the hours between 3:00 p.m. and 7:00 a.m. This was known as the "first call" policy and was followed by NWTH regardless of the seriousness of the surgery scheduled, the condition of the patient to have the surgery or the degree of

danger the anesthesia posed to the patient. This "first call" policy was of monetary benefit to NWTH in that it allowed NWTH to charge the patient for anesthesia services performed by its CRNAs while anesthesiologists (M.D.s) who performed anesthesia at NWTH billed the patient directly for his or her services.

* * * * * *

21. The laws of the State of Texas and the Federal Government prohibit CRNAs, as well as other nurses, from making independent decisions.

22. In order to comply with the above laws and the standards promulgated by the Joint Commission on Accreditation of Hospitals (JCAH), NWTH adopted a written policy regarding the use of CRNAs which stated in pertinent part, "[w]hen the CRNA is working in the immediate absence of an Anesthesiologist, the operating surgeon shall have the responsibility for the medical conduct of the anesthetist."

23. NWTH neither implemented nor had any actual intention of implementing its written policy with regard to medical supervision of CRNAs.

* * * * * *

28. At all relevant times hereto, its was the persistent and wide-spread custom and practice of NWTH to allow CRNAs to formulate anesthetic plans to prescribe and administer dangerous State and Federally controlled prescription drugs to patients without the supervision of a licensed physician. NWTH had actual or constructive knowledge of that custom and practice.

29. NWTH, through its custom and practice described above, participated in and knowingly allowed and encouraged CRNAs to illegally prescribe, distribute and administer controlled dangerous drugs in direct violation of the Texas Controlled Substances Act, . . . Texas Dangerous Drug Act, . . . the Texas Pharmacy Act, . . . the Medical Practice Act, . . .; and the Federal Controlled Substances Act, 21 U.S.C. § 801, *et seq.*

As a direct result of the lack of medical supervision, a Certified Registered Nurse Anesthetist injected an improper anesthetic drug into Mike Mitchell, causing his death. Then, relying on *Langley*, the Mitchells conclude that "the only question presented is whether the practice of allowing unsupervised nurses to administer anesthesia constitutes a constitutional tort."

It does, they propose, because "it manifests deliberate indifference to the lives and safety of patients at the hospital and it is tantamount to a policy of allowing CRNAs to criminally assault patients." Their proposal is founded on the premise that "government policies and customs which manifest deliberate indifference to the lives and safety of the public violate the due process clause." *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989) (the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contract). This deliberate indifference standard has been applied by the federal courts in many other contexts, and the Mitchells suggest that "[p]ublic hospitals also violate the constitution when they manifest deliberate indifference to the lives and safety of their patients." Relying on *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981), and *Morrison v.*

Washington County, Ala., 700 F.2d 678 (11th Cir. 1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78L.Ed.2d 171 (1983), they assert that their "allegations of deliberate indifference to patient safety are, if anything, far stronger than the claims asserted in the above cases" because the custom of utilizing nurse anesthetists to administer anesthesia without any medical supervision created obvious and known risks of injury. Anesthesia involves the injection of deadly drugs into the human body for the very purpose of rendering it unconscious. The proper selection of drugs is critical to the life of the patient. The state itself, they continue, has recognized these risks and sought to protect individuals by prohibiting anyone other than a licensed physician to administer anesthesia. Both state and federal law prohibit non-physicians from prescribing the deadly drugs used during anesthesia. Finally, they conclude that CRNAs are not qualified to prescribe and administer these drugs without medical supervision and cannot legally do so.

In response, the Hospital and Martin argue that the trial court was correct in granting their special exceptions and dismissing the section 1983 claims because the Mitchells failed to allege the deprivation of a constitutional right. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), and to allege the deprivation resulted from an abuse of governmental power. *Collins v. City of Harker Heights, Tex.*, 916 F.2d 284 (5th Cir. 1990), *aff'd*, 503 U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 216 (1992); *Rankin v. City of Wichita Falls*, Tex., 762 F.2d 444 (5th Cir. 1985). They also contend that the Mitchells are attempting to raise the common law tort of medical malpractice into a constitutional claim under section 1983. *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986).

Subsequent to the parties' original briefings, the United States Supreme Court ruled that "[o]ur cases do not support the [Fifth Circuit] court of Appeals' reading of an abuse of governmental power separate and apart from the proof of a constitutional violation." *Collins v. Harker Heights*, 503 U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261, 269 (1992). Following this decision and upon leave, the Mitchells filed a supplemental brief, and the Hospital and Martin filed reply briefs.

In their supplemental brief, the Mitchells contend that the decision on *Collins* rejected "the central ground upon which Appellees urged dismissal of [their] civil rights claims." Based upon the authority discussed below, we disagree.

Even though the *Collins* Court disapproved the "abuse of governmental power standard in Fifth Circuit precedent, the Court affirmed the dismissal of Collins' cause of action under section 1983. The Court held that the city's alleged failure to train its employees, or warn them about the known risks of harm by entering sewer mains through manholes, was an omission that could not be properly characterized as "arbitrary, or conscience-shocking, in a constitutional sense." Collins' claim was analogous to a fairly typical state law tort claim. The city breached its duty of care by failing to provide a safe work environment. 503 U.S. at ___, 112 S.Ct. at 1070, 117 L.Ed.2d at 275.

The Due Process Clause of the Fourteenth Amendment does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. It should not be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. *Id.*

Similarly, section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties arising out of tort law. *Baker v. McCollan*, 443 U.S. at 146, 99 S.Ct at 2695. It also does not provide a right to be free of injury whenever a government actor may be characterized as a tortfeasor. *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 700 (5th Cir. 1991). In *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2nd Cir. 1971), the Court reasoned that

> [F]ew decisions of doctors or administrators in a public hospital will provide a proper basis for a section 1983 action because such decisions do not usually affect rights secured by the Constitution and laws of the United States. . . . [M]ere negligence in giving or failing to supply medical treatment alone will not suffice for a section 1983 action. Similarly, the negligent running over a pedestrian by a United States mail truck or the negligent lopping off of the wrong arm by a surgeon employed in a public hospital would be unfortunate, to say the least, and would give rise to actions based on negligence but would not violate rights protected by section 1983. It is difficult to imagine a case where a valid constitutional claim grows out of negligent medical treatment alone. Where medical treatment of a patient in a public hospital is alleged to be the basis of an invasion of a recognized constitutional right, some other highly unusual factor would seem to be necessary.

Id. at 704.

Although the Mitchells maintain that their injures were not the result of negligence, but were the result of the Hospital's deliberate decision to allow nurse anesthetists to prescribe and administer anesthesia in violation of state and federal law, their allegations under these facts and circumstances cannot be characterized as arbitrary, or conscience-shocking, in a constitutional sense. *Collins v. Harker Heights*, 503 U.S. at ___, 112 S.Ct. at 1070, 117 L.Ed.2d at 275. Despite their insistence that this cause is one of constitutional proportions, the Mitchells are attempting to turn a medical malpractice tort case into a section 1983 claim. *Godinet v. Thomas*, 824 S.W.2d 632, 633 (Tex. App. - Houston [14th Dist.] 1991, writ denied). Assuming, arguendo, that the practice of allowing nurse anesthetists, or CRNAs, to administer anesthesia violates state or federal law, the Mitchells have alleged a cause of action for negligence per se. State tort law, rather than the substantive due process component of the Fourteenth Amendment, should govern a cause of action for medical malpractice. *Accord, Estelle v. Gamble*, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), *reh'g denied*, 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785 91977) (medical decision not to order an X-ray or like measures is medical malpractice and the proper forum is state court under the Texas Tort Claims Act).

It follows that the Mitchells have failed to allege the deprivation of a right, privilege or immunity secured by the Constitution or the laws of the United States, and their petition does not state a cause of action under 42 U.S.C. § 1983. Under these circumstances, we cannot fault the trial court for granting the special exceptions and dismissing the claims under 42 U.S.C. § 1983. The second point of error is overruled.

The Mitchells utilize their third-point contention to allege that the court erred in granting special exceptions and striking their section 1983 claim, because their petition properly stated a cause of action for denial of procedural due process rights under the United States Constitution. They submit that the Hospital and Martin violated procedural due process by failing to use fair procedures in implementing the practice of allowing nurses to illegally prescribe and administer anesthesia. Although the consequences in this case are far more tragic, they also suggest that the procedural violations are not unlike those in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

The due process violations in *Zinermon* arose when Burch was found wandering along a Florida highway appearing to be hurt and disoriented. He was taken to a private health care facility designated by the state to receive patients suffering from mental illness. Later, he was transferred to a public hospital owned and operated by the state as a mental and health treatment facility. Upon his arrival, he signed forms for voluntary admission and treatment. 494 U.S. at 118-19, 110 S.Ct. at 979-80.

After his release, Burch instituted a suit in a federal district court against eleven physicians, administrators and staff members of the state hospital alleging that they violated a Florida statute in admitting him as a voluntary patient when they knew or should have known that he was incapable of making an informed decision as to his admission. He also claimed that he was entitled to receive the procedural safeguards provided by Florida's involuntary placement procedure and that his due process rights were violated. *Id.* at 123-24, 110 S.Ct. at 982-83.

In deciding whether his allegations were sufficient to state a claim under section 1983, the United States Supreme Court explained that:

> The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 cause of action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty or property" is not itself unconstitutional; what is unconstitutional is the deprivation of such interest without due process of law. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Id. at 125-26, 110 S.Ct. at 983 (citations and footnote omitted).

Due process is a flexible concept that varies with the particular situation. To determine what procedural protections the Constitution requires in a particular case, the Court weighed several factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 127, 110 S.Ct. at 984 (quoting in part, *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)).

In applying this test, the Mitchells propose that life is the substantial private interest which is affected by official action. In this connection, they argue that the risk of erroneous injury or death from the Hospital's and Martin's practice of using unsupervised nurses to administer anesthesia is quite high since MDs are authorized to practice anesthesia and prescribe drugs. The risk of injury was exacerbated by the Hospital's failure to inform surgeons and patients of its practice of using unsupervised nurses. Additional or substitute procedural safeguards would have helped lessen the risk of injury and would pose no fiscal or administrative burdens on the Hospital. "[N]otifying the patient and the surgeon prior to surgery that an unsupervised nurse would be selecting and administering the anesthetic drugs would at least have allowed the patient to decide whether to accept the risk of such services or go to another hospital." Consent to surgery and anesthesia must be obtained in any event; and therefore, "an explanation of who is going to be administering anesthesia could easily be provided at that time." The Hospital also has no governmental interest in its current practice other than to

perpetuate a fraud upon its patients. Hence, these "factors mandate that the Hospital should have provided more process to patients before subjecting them to the dangers of using unsupervised nurses to administer anesthesia." We are not persuaded by their proposal.

Before applying the factors set forth in *Zinermon*, the Mitchells are still required to allege the deprivation of a constitutionally protected life, liberty or property interest. The *Zinermon* Court recognized that Burch's confinement in the state hospital for five months without a hearing or any other procedure infringed a liberty interest. *Id.* 494 U.S. at 131, 110 S.Ct. at 986. In *Parham v. J.R.*, 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), the court acknowledged that "a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment."

In this cause, the Mitchells alleged that Mike Mitchell was admitted to the Hospital where he was diagnosed as having cardiac tamponade, a condition in which fluid collects between the heart and the pericardium, and that surgery was needed as quickly as possible to drain the fluid. They also pleaded:

35. NWTH [The Hospital] was also aware that MIKE MITCHELL's condition was deteriorating and knew or should have known that, by inducing MITCHELL to rely upon NTWH until his condition made it too late to seek care elsewhere, NWTH effectively deprived MIKE MITCHELL of the freedom to choose to go elsewhere for such services.

36. At the moment MIKE MITCHELL was taken to surgery he became totally dependent upon NWTH to provide the minimal care necessary to sustain his life.

Defendant NWTH was aware of and accepted MITCHELL's dependency upon it. Upon entering surgery, NWTH assumed control of MIKE MITCHELL's very existence.

Continuing, they further pleaded that before being taken into the operating room for the surgery to relieve the cardiac tamponade, Mike Mitchell was asked to sign a consent form agreeing to the surgery.

Considering these allegations, it is important to recognize that unlike *Zinermon* and *Parham*, Mike Mitchell was voluntarily admitted to a public hospital with a heart condition requiring immediate and necessary medical treatment. The Mitchells have not cited any supporting authority for the proposition that the freedom to go elsewhere for medical services is a protected interest under the United States Constitution. Rather, they propose that by notifying the patient and the surgeon of the practice of using unsupervised nurses to select and administer anesthesia, it would allow a patient to decide whether to accept the risk of such services or go to another hospital. This proposal is similar to the theory of informed consent which is based on negligence. Under this theory of tort law, they could not recover unless they proved that Mike Mitchell would not have consented to treatment had he been informed of the undisclosed risk, and that he was injured by the occurrence of the risk of which he was not informed. *See, e.g., Hartfiel v. Owen*, 618 S.W.2d 902, 904-05 (Tex.Civ.App. - El Paso 1981, writ ref'd n.r.e.).

Under these facts and circumstances, the Mitchells have alleged common law negligence, not the deprivation of a constitutionally protected life, liberty or property interest. It being undisputed that Mike Mitchell was asked to sign a consent form before surgery, the Hospital provided due

process which, given his condition at the time of admission, was constitutionally adequate. In this light, the trial judge cannot be faulted for granting the special exceptions and dismissing the claims under 42 U.S.C. ^S 1983. The third point of error is overruled.

With their fourth point of error, the Mitchells contend the court erred in granting special exceptions and striking their section 1983 claims for denial of rights secured to them by the federal drug laws because their petition properly stated that cause of action. Deprivations of federal statutory rights carried out under color of state law are also actionable under section 1983, and appellants refer to the deprivation of rights under the National Labor Relations Act, *see Golden State Transit v. Los Angeles,* 493 U.S. 103, 110 S.Ct. 444, 107 (L.Ed.2d 420 (1989), rights under public housing regulations, *see Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (187), and rights under the Social Security Act. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). Specifically, they submit that the Federal Controlled Substances Act "requires persons administering specified controlled substances, including some of the anesthetic drugs administered to Mike Mitchell, to be registered." However, they have not informed us of the portion of the Act upon which they rely.

To determine the availability of section 1983 to remedy a statutory violation, the United States Supreme Court has pronounced this two-step inquiry:

> First, the plaintiff must assert the violation of a federal right. . . . Section 1983 speaks in terms of "rights, privileges or immunities," not violations of federal law. In

> deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment.". . . The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." . . . We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff . . . .

Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983, . . . by providing a "comprehensive enforcement mechanis[m] for protection of a federal right," . . . .

Golden State Transit v. Los Angeles, 493 U.S. at 106, 110 S.Ct. at 448 (citations omitted).

Although the Mitchells have not designated or referred to any portion of the Federal Controlled Substances Act upon which their reliance is placed, we observe that section 823(f) provides, in part, that if practitioners are authorized to dispense or conduct research under the law of the State in which they practice, they shall be registered to dispense or conduct research with controlled substances. Separate registration under this part for practitioners engaging in research with non-narcotic controlled substances, who are already registered under this part in another capacity, shall not be required. Pharmacies (as opposed to pharmacists) when engaged in commercial activities, shall be registered to dispense controlled substances if they are

authorized to dispense under the law of the state in which they regularly conduct business. 21 U.S.C. § 823(f).

Additionally, the Act provides that practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose. The Attorney general shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment. 21 U.S.C. § 823(g). A registration to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General. 21 U.S.C. § 824(a).

Considering these provisions, the Mitchells have not asserted a federal right under the Federal Controlled Substances Act. The Act requires that certain manufacturers, distributors and pharmacies of controlled substances be registered by the Attorney General and that periodic reports be submitted, but it neither grants a private right nor provides a cause of action to the Mitchells. Because they have not asserted a federal right, we need not address whether Congress specifically foreclosed a remedy under section 1983 by providing a comprehensive enforcement mechanism for protection of a federal right. *Middlesex Cty. Sewage Auth. v. Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 (1981). The fourth point of error is overruled.

By their fifth and sixth points, the Mitchells charge the court with error in granting special exceptions and striking their claims for denial of substantive and procedural due process guaranteed by the Texas Constitution, because their petition properly stated these causes of action. Initially, they submit that Texas courts have recognized

direct causes of action for deprivation of state constitutional rights. *See Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980); *Jones v. Memorial Hosp. System*, 746 S.W.2d 891 (Tex.App. - Houston [1st Dist.] 1988, no writ). They offer that "the only question is whether the conduct alleged in the Plaintiffs' petition states a cause of action for deprivation of state due process rights." The provisions in article I, section 19 of the Texas Constitution and the Fourteenth Amendment of the United States Constitution are similar, but the Mitchells argue that the state provision should be given a broader interpretation. *See LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986).

Despite recognition that the individual rights guaranteed in the present constitution reflect Texas' values, customs and traditions, *LeCroy v. Hanlon*, 713 S.W.2d at 339, the Mitchells have not alleged a cause of action for the deprivation of due process rights, substantive or procedural, under article I, section 19 of the Texas Constitution. They have not cited any authority providing for a private cause of action under this constitutional provision, and their reliance on *Steele* and *Jones* is not well-founded, because neither case recognized a cause of action or remedy under article I, section 19.

In *Bagg v. Univ. of Texas Medical Branch*, 726 S.W.2d 582 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.), plaintiff-appellant brought suit against a medical branch of the state university system seeking damages and equitable relief when it terminated him without following disciplinary procedures. He essentially sought relief for denial of due process by citing to both the federal and state constitutions. The court, finding no Texas statute or case that provided a citizen with the kind of redress afforded by 42 U.S.C. § 1983, held that there is no state

constitutional tort. *Id.* at 584 n. 1.

Considering this authority and the pleadings in the appellate record before us, we deem the Mitchells have not alleged a cause of action under the due process clause of the Texas Constitution. The trial court, therefore, did not err in granting the special exceptions and dismissing the claims under the Texas Constitution. The fifth and sixth points of error are overruled.

When rendering the take-nothing summary judgment in favor of Martin, the court did not specify the ground(s) for its rendition. By attacking the rendition with their seventh point, the Mitchells must show that each independent ground presented in Martin's motion for summary judgment, *Insurance Co. of N. Am. v. Security Ins.*, 790 S.W.2d 407, 410 (Tex. App. - Houston [1st Dist.] 1990, no writ), since the judgment will be affirmed if any of the grounds advanced in the successful motion are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

By their seventh-point presentation, the Mitchells have not addressed Martin's summary judgment ground that he did not have a doctor-patient relationship with Mike Mitchell. It is undisputed that a physician-patient relationship was not created between Martin and Mike Mitchell and, absent the relationship, Martin would not be liable for malpractice or negligence. *Wilson v. Winsett*, 828 S.W.2d 231, 232 (Tex. App. - Amarillo 1992, writ granted).

Notwithstanding, the Mitchells represent that "Martin is not sued in his capacity as a private physician since he had no direct role in providing care to Mike Mitchell. He is sued solely for his wrongful administrative and supervisory acts as an official of [the Hospital]." In this regard, they

argue the existence of ample evidence to raise genuine issues of fact regarding Martin's claim that he was not bound by the duties spelled out in his contract with the Hospital.

It is unnecessary to decide whether Martin was or, as he claims, was not bound by the contract which expired before Mike Mitchell's surgery. Whether, by virtue of his administrative capacity, he had a duty to ascertain that licensed physicians, rather than CRNAs, administered anesthesia is a question of law for the court. Generally, there is no duty for one to control the conduct of third persons; however, the question is best determined by the consideration of interrelated factors. Important factors are risk, foreseeability, the likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. The most important factor is foreseeability. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

In his official position, Martin was administering the existing scheduling policy of the Hospital. He did not have authority to change the policy; indeed, he had suggested a change that would have placed anesthesiologists rather than CRNAs on first call, but the anesthesia policy was not changed. then, according to policy, Martin scheduled CRNA Adamson on first call at the time of Mike Mitchell's surgery. Still, the anesthesia policy further provides that when a surgical procedure is scheduled, the operation surgeon has the option of determining the personnel to administer the anesthesia. Baay made no request for an anesthesiologist.

Understandably, the operating surgeon, who is familiar with the patient and his needs, not only is in the best

position to foresee the need for an anesthesiologist, but is the person empowered to make that decision. The consequences of placing that burden on Martin, who was not present for the operation and who could not make the final decision of personnel to administer the anesthesia, would subject him to liability, even though nothing in this record shows he knew or had reason to know that harm would befall Mike Mitchell.

Given the absence of evidence of foreseeability on the part of Martin in applying the *Phillips* factors to this record, the trial court was justified in finding as a matter of law that Martin had no duty to ascertain that an anesthesiologist rather than a CRNA administered the anesthesia to Mike Mitchell. The Mitchells' seventh point of error is overruled.

The trial court erred in granting Martin's motion for summary judgment, the Mitchells contend with their eighth point, because their petition properly alleged legally-recognized common law causes of action against him. In explanation, they charge Martin with the violation of a duty in knowingly assigning a nurse to unlawfully practice medicine on an unsuspecting patient in direct violation of the Texas Medical Practice Act. Tex.Rev.Civ.Stat.Ann.art. 4495b, § 1.01 *et seq.* (Vernon Supp.Pamp.1993). As support, they cite *Central Anesthesia Associates, P.C. v. Worthy*, 254 Ga. 728, 333 S.E.2d 829 (1985), as factually identical to this cause.

The Mitchells do not point out with particularity what provisions of article 4495b they contend were violated, nor why Worthy is factually identical. It is not our

responsibility to discharge their burden. *Saldana v. Garcia*, 155 Tex. 242, 285 S.W.2d 197, 201 (1955).

Nevertheless, we observe that the *Worthy* court, determining that the Georgia statute regulating who is authorized to administer anesthesia established a standard of care, 333 S.E.2d at 833, held the defendants were guilty of negligence per se when a student nurse, who was not authorized to do so, administered the anesthesia. ***Id.*** at 831. Inappositely, article 4495b, *supra, contains in its section 3.06(d) the authorization for a person licensed to practice medicine "to delegate to any qualified and properly trained person" the act of administering dangerous drugs. By subsection (1) of section 3.06(d), there is vested in the Board of Medical Examiners the authority to determine whether any medical act constitutes the practice of medicine, and whether any medical act may be properly or safely delegated by physicians. Section 2.09(j) confers on the Board the right to institute action to enjoin the violations of any provision of the Act, and section 3.07(a) provides that a person practicing medicine in violation of the Act commits a Class A misdemeanor offense.*

Aside from the reality that the legislature's adoption of a criminal statute does not mean that it is accepted as a standard for civil liability, Carter v. William Sommerville and Son, Inc., 584 S.W.2d 274, 278-79 (Tex. 1979), we discern nothing in the Mitchells' pleadings that alleges a common law cause of action against Martin predicated on a violation of article 4495b. In this situation, the trial court did not err in rendering summary judgment. The eighth point of error is overruled.

The Mitchells utilize their final point of error to fault the trial court for granting special exceptions and striking their claims for damages suffered prior to the death of Mike Mitchell. The damages sought as legally recoverable were for loss of consortium, mental anguish, and interference with

constitutionally protected familial relationships, due to the Hospital's and Martin's "actionable conduct." However, because the Mitchells have not shown actionable conduct upon which to premise the causes of action alleged, any error in granting the special exceptions and striking the claims for damages would be harmless error. *Kelly v. Wright*, 144 Text. 114, 188 S.W.2d 983, 985-86 (1945). The ninth point of error is overruled.

Accordingly, the final judgment of the trial court is affirmed.

IN THE 181ST JUDICIAL DISTRICT COURT

IN AND FOR POTTER COUNTY, TEXAS

JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, Deceased; JANET MITCHELL, as Next Friend of of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her Minor Children; and DALE MITCHELL,

Plaintiffs,

V.
NO. 69,391-B

JAMES ADAMSON, CRNA; JOHN E.W. BAAY, M.D., Individually and D/B/A JOHN E.W. BAAY, a Professional Association; AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his official capacity as Medical Director of the Department of Anesthesia of AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL; and RAYMOND A. MARTIN, M.D., P.A.,

Defendants.

ORDER

On the 17th day of September, 1990, there came on to be heard the Special Exceptions of Defendant Amarillo Hospital District to Plaintiffs' First Amended Petition After Consolidation. Jerry D. McLaughlin, the duly appointed guardian ad litem of Valerie Nicole Mitchell and Clayton Lee Mitchell, appeared in person and announced that he had filed an original petition adopting Plaintiffs' First Amended Petition After Consolidation as
his pleading in his capacity as guardian ad litem. Plaintiffs and Raymond A. Martin, M.D., Individually and in his official capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District d/b/a Northwest Texas Hospital, and Raymond A. Martin, M.D., P.A., and Amarillo Hospital District appeared through their attorneys of record. It was stipulated by attorneys for all parties that the pleadings of the Defendants in response to Plaintiffs' First Amended Petition After Consolidation could also be considered as responsive to the original petition of the guardian ad litem without the necessity of any additional written pleadings.

It was also stipulated at the hearing by the attorneys for all parties that counsel for Raymond A. Martin, M.D., Individually and in his official capacity as Medical Director of the Department of Anestheisa of Amarillo Hospital District d/b/a Northwest Texas Hospital and Raymond A. Martin, M.D., P.A. (hereinafter "the Martin Defendants"), could adopt the special exceptions of Amarillo Hospital District with respect to the allegations made against the Martin Defendants similar to those which were subject to the exceptions of the Amarillo Hospital District even though written pleadings asserting such exceptions had not yet been

filed at the time of the hearing. Subsequent to the hearing and prior to this order, the Martin Defendants have incorporated such exceptions by reference in their Supplemental Answer to Plaintiffs' First Amended Petition after Consolidation.

After reviewing Plaintiffs' First Amended Petition After Consolidation and the Special Exceptions thereto, the Court is of the opinion that the Special Exceptions should be granted and thereupon in open court announced its ruling that the Special Exceptions were GRANTED. Thereupon, counsel for Plaintiffs and the guardian ad litem announced in open court that they elected to stand upon their pleadings. It is therefore ordered that all of Plaintiffs' claims against Defendant Amarillo Hospital District and their remaining claims against the Martin Defendants be and the same are hereby DISMISSED. Defendants are entitled to recover all of their costs from Plaintiffs.

All of Plaintiffs' claims for relief against the Martin Defendants, and Amarillo Hospital District, having been denied, the Cross-Claims of the Defendants for contribution or indemnity are hereby DISMISSED.

It further appearing to the Court that Defendant Amarillo Hospital District desires to nonsuit its counterclaim against Plaintiff Janet Mitchell, as evidenced by the approval by its attorney of this order, IT IS THEREFORE ORDERED that the Counter-Claim of Amarillo Hospital District against Plaintiff Janet Mitchell be and the same is hereby DISMISSED without prejudice.

All relief not expressly granted herein is denied.

SIGNED THIS 7th day of November, 1990.

/S/
Judge Presiding

APPROVED AS TO FORM:

HOFFMAN, SHEFFIELD & SAUSEDA
1008 S. Madison
Amarillo, Texas 79101
FAX: (806) 376-5345
(806) 376-8903

By /S/
Tim Hoffman

ATTORNEYS FOR PLAINTIFFS

PEEK & MCLAUGHLIN
P. O. Box 9197
Amarillo, Texas 79105
FAX: (806) 376-1526
(806) 376-1523

By /S/
Jerry D. McLaughlin

GUARDIAN AD LITEM OF VALERIE NICOLE MITCHELL AND CLAYTON LEE MITCHELL

UNDERWOOD, WILSON, BERRY, STEIN & JOHNSON, P.C.
P. O. Box 9158
Amarillo, Texas 79105
FAX: (806) 379-0316

(806) 376-5613

By /S/
James A. Besselman

ATTORNEYS FOR DEFENDANT, RAYMOND A. MARTIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL DIRECTOR OF THE DEPARTMENT OF ANESTHESIA OF AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL; AND RAYMOND A . MARTIN, M.D., P.A.

GIBSON, OCHSNER & ADKINS
500 First National Bank Building
Amarillo, Texas 79101
FAX: (806) 378-9797
(806) 372-4271

By /S/
Thomas C. Riney

ATTORNEYS FOR DEFENDANT, AMARILLO HOSPITAL DISTRICT

IN THE 181ST JUDICIAL DISTRICT COURT

IN AND FOR POTTER COUNTY, TEXAS

JANET MITCHELL, Individually	§
and as Personal Representative	§
and Heir of the Estate of	§
MIKE MITCHELL, Deceased, and	§
JANET MITCHELL, as Next Friend of	§
of VALERIE NICOLE MITCHELL and	§
CLAYTON LEE MITCHELL, her Minor	§
Children; and DALE MITCHELL,	§
	§
Plaintiff,	§
	§
VS.	§
NO. 69,391-B	§
	§
JAMES ADAMSON, CRNA; JOHN E.W.	§
BAAY, Individually and d/b/a	§
JOHN E.W. BAAY, A Professional	§
Association; AMARILLO HOSPITAL	§
DISTRICT d/b/a/ NORTHWEST TEXAS	§
HOSPITAL; RAYMOND A. MARTIN,	§
Individually and in his	§
official capacity as Medical	§
Director of the Department of	§
Anesthesia of Amarillo	§
Hospital District d/b/a	§
Northwest Texas Hospital; and	§
RAYMOND A. MARTIN, M.D., P.A.,	§
	§
Defendants.	§

ORDER GRANTING SUMMARY JUDGMENT OF DEFENDANTS, RAYMOND A. MARTIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL DIRECTOR OF THE DEPARTMENT OF ANESTHESIA OF AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL, RAYMOND A. MARTIN, M.D., P.A.

On the 17th day of September, 1990, the court reconsidered the Motions for Summary Judgment filed in this cause by Raymond A. Martin, Individually and in his official capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District, d/b/a Northwest Texas Hospital, Raymond A. Martin, M.D., P.A., Defendants. All of the parties to this case, including the Plaintiffs, appeared in open court and were heard on the matter, having waived the requisite time considerations for the hearing, and having waived renewed verification of Defendants' Motion and the requirement for new affidavits. The court, after examining the pleadings and the summary judgment evidence and hearing the arguments, is of the opinion, and finds, that the Defendants, Raymond A. Martin, Individually and in his official capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District, d/b/a Northwest Texas Hospital, Raymond A. Martin, M.D., P.A., are entitled to summary judgment as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs, take nothing against these Defendants, Raymond A. Martin, Individually and in his official capacity as Medical Director of the Department of Anesthesia of Amarillo Hospital District, d/b/a Northwest Texas Hospital, and Raymond A. Martin, M.D., P.A., and

that these Defendants recover all costs in their behalf expended of and from Plaintiffs, for which let execution issue.

SIGNED this 19th day of September, 1990.

/S/

Judge Presiding

IN THE 181ST DISTRICT COURT
IN AND FOR
POTTER COUNTY, TEXAS
CAUSE NO. 69,391-B

JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, Deceased; and JANET MITCHELL as Next Friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her Minor Children; and DALE MITCHELL,	§
Plaintiffs,	§
VS.	§
JAMES ADAMSON, CRNA: JOHN E.W. BAAY, M.D., Individually and D/B/A JOHN E.W. BAAY, a Professional Association; AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D. Individually and in his official capacity as Medical Director of the Department of Anesthesia of AMARILLO HOSPITAL DISTRICT D/B/A NORTHWEST TEXAS HOSPITAL; and RAYMOND A. MARTIN, M.D., P.A.,	§
Defendants.	§

PLAINTIFFS' FIRST AMENDED PETITION AFTER CONSOLIDATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JANET MITCHELL, Individually and as Personal Representative and Heir of the ESTATE OF MIKE MITCHELL, Deceased, and JANET MITCHELL, as Next Friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her Minor Children; and DALE MITCHELL complaining of JAMES ADAMSON, CRNA; JOHN E.W. BAAY, M.D., Individually and d/b/a JOHN E.W. BAAY, a Professional Association; AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his official capacity as Medical Director of the Anesthesia Department of AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; and RAYMOND A. MARTIN, M.D., P.A., and for cause of action would respectfully show unto the Court as follows:

1. This action is brought pursuant to the laws of the State of Texas; §71.001 et. seq. of the Civil Practice & Remedies Code (commonly referred to as the Wrongful Death Statute); §71.021 of the Civil Practice & Remedies Code (commonly referred to as the Survival Statute); V.T.C.A. Penal Code §101.001 et. seq.; Art. 1 §13 and §19 of the Texas Constitution; Federal laws; 42 U.S.C. §1983 and §1988; and the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

2. Plaintiffs make no claim herein against AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST

TEXAS HOSPITAL under the Texas Tort Claims Act.

PARTIES

3. At all material times, Plaintiff JANET MITCHELL was a resident of Amarillo, Potter County, Texas. She is the personal representative and heir of the Estate of her husband MIKE MITCHELL, Deceased. An administration of the ESTATE OF MIKE MITCHELL is not necessary.

4. At all material times, Plaintiffs VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL were residents of Amarillo, Potter County, Texas. They are the surviving children of MIKE MITCHELL, Deceased. Plaintiff DALE MITCHELL is and was at all times material a resident of Amarillo, Randall County, Texas, and is the natural father of MIKE MITCHELL, Deceased.

5. At all times relevant hereto, Defendant AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL (sometimes herein referred to as "NWTH") was a municipal corporation of Amarillo, Potter County, Texas, organized and existing under and by virtue of the laws of the State of Texas. At all material times, NWTH was a major trauma center rendering medical services and treatment to citizens in a four State area and holding itself out to the public and to Plaintiff and the Deceased in particular as a fully staffed and professionally operated hospital with the capability of rendering medically acceptable treatment and care to all who enter its facility. NWTH has previously been given notice of this action and has appeared and made answer herein.

6. Defendant RAYMOND A. MARTIN, M.D. is a

physician duly licensed to practice in the State of Texas who at all times material to this action maintained his principal place of business within the confines of Amarillo, Texas. Defendant RAYMOND A. MARTIN, M.D., P.A. is a corporation duly organized and existing under and by virtue of the laws of the State of Texas. At all times relevant hereto, Defendant RAYMOND A. MARTIN, M.D. was an Anesthesiologist and the Department Director of Anesthesia Services for AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL. Defendant MARTIN is sued herein individually and in his official capacity as well as in his corporate capacity. Defendants RAYMOND A. MARTIN and RAYMOND A. MARTIN, M.D., P.A. have been given due notice of this action and have appeared and made answer herein.

7. At all times relevant to this action and in all their actions described herein, Defendants MARTIN and NWTH were acting under the color of State law for purposes of 42 U.S.C. §1983. Defendant MARTIN was acting pursuant to his authority as Director of the Department of Anesthesia for AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL.

8. Defendant JOHN E.W. BAAY, M.D. is a physician duly licensed by the State of Texas who at all material times maintained his principal place of business within the confines of Amarillo, Texas. Defendant JOHN E.W. BAAY, a Professional Association, is a corporation duly organized and existing under and by virtue of the laws of the State of Texas. Defendant BAAY is sued herein individually and in his corporate capacity. He has been given notice of this action and has appeared and made answer herein.

9. At all times relevant to this action, Defendant JAMES ADAMSON, CRNA, was a Certified Registered Nurse Anesthetist employed by Defendant AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL and acting in such capacity as the agent, servant and employee of AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL. He is sued herein individually and in his official capacity. Defendant ADAMSON has been given lawful notice of this action and has appeared and made answer herein.

VENUE

10. Venue of this action is proper in Potter County, Texas where the cause of action accrued.

FIRST CAUSE OF ACTION

11. On February 24, 1987, at approximately 11:30 a.m., MIKE MITCHELL was admitted to NWTH pursuant to his physician's instructions.

12. Following an echocardiogram which began about 8:00 p.m. and was completed about 8:30 p.m., MIKE MITCHELL was diagnosed as having cardiac tamponade, a condition in which fluid collects between the heart and the pericardium. This condition places pressure on the heart and makes it more difficult for the heart to beat. The diagnosis was made by MITCHELL's cardiologist about 9:15 p.m., and the cardiologist immediately contacted MITCHELL's surgeon, JOHN BAAY, M.D. (hereinafter referred to as "BAAY").

13. The cardiologist and BAAY reviewed the

echocardiogram about 9:45 and decided that surgery was needed as quickly as possible to drain the fluid from around MITCHELL's heart. BAAY then contacted NWTH personnel and told them that MITCHELL's surgery should be scheduled immediately.

14. On and prior to February 24, 1987, there existed at NWTH a policy that NWTH employee nurse anesthetists (CRNAs) rather than anesthesiologists (M.D.s) were to be called to perform anesthesia for surgeries during the hours between 3:00 p.m. and 7:00 a.m. This was known as the "first call" policy and was followed by NWTH regardless of the seriousness of the surgery scheduled, the condition of the patient to have the surgery or the degree of danger the anesthesia posed to the patient. This "first call" policy was of monetary benefit to NWTH in that it allowed NWTH to charge the patient for the anesthesia services performed by its CRNAs while anesthesiologists (M.D.s) who performed anesthesia at NWTH billed the patient directly for his or her services.

15. Pursuant to this "first-call" policy, Defendant NWTH designated JAMES ADAMSON, a Certified Registered Nurse Anesthetist employed by NWTH (hereinafter sometimes referred to as "ADAMSON"), to perform the anesthesia services required for MIKE MITCHELL's surgery.

16. At the time BAAY contacted NWTH personnel to schedule the MITCHELL surgery, ADAMSON was involved in another surgery, and, because of the NWTH "first call" policy previously described, NWTH personnel decided to wait until ADAMSON was available before preparing for the MITCHELL surgery.

17. ADAMSON finished with the prior surgery shortly before 11:00 p.m. and left the hospital without being advised that he was needed for the MITCHELL surgery. Upon realizing that ADAMSON was gone, NWTH personnel contacted ADAMSON at home at about 11:20 p.m. and advised that he was needed for the MITCHELL surgery. ADAMSON reported to the hospital, and MITCHELL was taken to surgery at approximately 11:30 p.m., nearly two hours after it was decided he needed immediate surgery.

18. Anesthesiology is the practice of medicine.

19. General anesthesia is induced through the use of a variety of extremely powerful drugs designed to render a human being unconscious. These drugs, in fact, shut down a person's life support systems and are, therefore, the most critical part of any surgery. The patient is completely dependent upon the anesthesia specialist to use his knowledge, training and skill in choosing and administering the appropriate anesthetic drugs.

20. Because of the recognized dangers of these drugs, the laws of the State of Texas prohibit dispensing them except upon the orders or prescription of a licensed physician. Texas Controlled Substances Act, Vernon's Ann.Civ.St. art. 4476-15 et. seq.; Texas Dangerous Drug Act, Vernon's Ann.Civ.St. art. 4476-14 et. seq. Federal law also prohibits the dispensing of these drugs by anyone other than a practitioner licensed by the State. Food, Drug and Cosmetic Act, 21 U.S.C. §301 et. seq. Many of the drugs used for anesthesia, including some of those administered to MIKE MITCHELL, are in a category considered so dangerous that they may only be dispensed by a licensed practitioner registered to dispense controlled substances under the Federal Controlled Substances Act, 21 U.S.C.

§801 et. seq.

21. The laws of the State of Texas and the Federal Government prohibit CRNAs, as well as other nurses, from making independent medical decisions.

22. In order to comply with the above laws and the standards promulgated by the Joint Commission on Accreditation of Hospitals (JCAH), NWTH adopted a written policy regarding the use of CRNAs which stated in pertinent part, "[w]hen the CRNA is working in the immediate absence of an Anesthesiologist, the operating surgeon shall have the responsibility for the medical conduct of the anesthetist."

23. NWTH neither implemented nor had any actual intention of implementing its written policy with regard to medical supervision of CRNAs.

24. NWTH failed to in any way communicate this written policy to BAAY and the other operating surgeons supposedly made responsible for CRNAs under the policy; failed to ensure that BAAY and other surgeons accepted the responsibility delegated to them under the policy; and/or failed to ensure that BAAY and other surgeons were capable of carrying out the responsibilities delegated to them under the policy.

25. NWTH failed to in any way communicate this written policy to its CRNAs or otherwise ensure that they were adequately supervised or trained for the tasks assigned to them.

26. At all times relevant hereto NWTH knew or should have known that its operating surgeons were not

capable of carrying out the responsibilities assigned to them by the policy and that the surgeons were not taking medical responsibility for CRNAs.

27. In support of these allegations, Plaintiffs would respectfully show the Court that Paula Dosen, M.D. was the Medical Director of Anesthesia at NWTH from July 1984 to September 1986. Dr. Dosen has previously testified under oath in this case that during her tenure as Medical Director of Anesthesia at NWTH:

1. Nurse anesthetists were on first call at NWTH regardless of whether the patient was having heart surgery or a tonsillectomy;

2. The written provision that nurse anesthetists at NWTH would be supervised by a physician anesthesiologist and that, if a licensed anesthesiologist could not be there, the nurse anesthetist would be supervised by the surgeon was included in the Policy and Procedure Manual to satisfy JCAH requirements;

3. Despite that written policy, CRNAs at NWTH were responsible for their own acts and were never supervised;

4. To her knowledge, CRNAs at NWTH have always formulated their own anesthesia plans, including choosing and obtaining anesthetic drugs without a physician's order;

5. Formulating an anesthetic plan and prescribing the drugs to be used is the

practice of medicine; and

6. Nurse anesthetists at NWTH formulated anesthetic plans and induced anesthesia without supervision just like anesthesiologists did. CRNAs, in fact, provided the same anesthesia services she provided as an anesthesiologist.

Jack Long, M.D, Chief of Surgery at NWTH from 1985 through 1987, testified under oath:

1. That he does not consider himself competent to provide anesthesia to surgery patients.

2. That, to his knowledge, surgeons never supervised nurse anesthetists at NWTH.

Pablo Diaz-Esquivel, M.D., who was President of the Medical Staff at NWTH from 1985 through 1986, testified under oath:

1. That he is not competent to provide anesthesia to surgery patients;

2. That, in all the surgeries he has performed at NWTH, he has never medically supervised a nurse anesthetist; and

3. That he doesn't know who, if anyone, medically supervised nurse anesthetists at NWTH.

JIM ADAMSON, who administered the anesthesia to MIKE MITCHELL, testified under oath that:

1. He decided which drugs were appropriate for the MITCHELL surgery;

2. He did not consult with any physician about the drugs or method of anesthesia;

3. His actions were pursuant to standard procedure at NWTH;

4. He has never been medically supervised at NWTH while giving anesthesia;

5. He was unaware of any supervision requirements for nurse anesthetists at NWTH; and

6. More than a year later, he still did not know whether or not the drugs he gave MITCHELL were appropriate for the patient's condition.

RAYMOND MARTIN, M.D., a Defendant herein, has testified that:

1. He was Medical Director of Anesthesia at NWTH at the time of MITCHELL's surgery;

2. He was not responsible for the medical supervision of NWTH CRNAs;

3. No one at NWTH medically supervised its nurse anesthetists;

4. Nurse anesthetists at NWTH were allowed to choose the drugs they would use;

5. Nurse anesthestists at NWTH have never been restricted in the drugs they chose and administered;

6. Drugs like Ethrane (which ADAMSON prescribed and administered to MIKE MITCHELL) are scheduled drugs; and

7. He doesn't "have a clue" as to how many local physicians have expertise in the field of anesthesia.

28. At all times relevant hereto, it was the persistent and wide-spread custom and practice of NWTH to allow CRNAs to formulate anesthetic plans and to prescribe and administer dangerous State and Federally controlled prescription drugs to patients without the supervision of a licensed physician. NWTH had actual or constructive knowledge of that custom and practice.

29. NWTH, through its custom and practice described above, participated in and knowingly allowed and encouraged CRNAs to illegally prescribe, distribute and administer controlled dangerous prescription drugs in direct violation of the Texas Controlled Substances Act, Vernon's Ann.Civ.St. art. 4476-15 et. seq.; Texas Dangerous Drug Act, Vernon's Ann.Civ.St. art. 4476-14 et. seq.; the Texas Pharmacy Act, Vernon's Ann.Civ.St. art. 4542a-1 et. seq; the Medical Practice Act, Vernon's Ann.Civ.St. art. 4495b et. seq.; and the Federal Controlled Substances Act, 21 U.S.C. §801 et. seq.

30. As a direct result of the above-described policies, custom and practice of NWTH, CRNA ADAMSON proceeded, completely on his own, to illegally formulate the

anesthetic plan for MIKE MITCHELL and to illegally induce physically intrusive and life-threatening prescription and controlled drugs to MIKE MITCHELL.

31. As a direct result of the above-described policies, custom and practice of NWTH, ADAMSON:

a) Did not perform a pre-anesthetic assessment of MIKE MITCHELL, or request that a pre-anesthetic assessment be performed, or inquire as to whether a pre-anesthetic assessment had been performed.

b) Did not consult with a licensed physician regarding the anesthetic plan he formulated for MIKE MITCHELL or request that a licensed physician approve the anesthetic plan.

c) Did not consult with a physician qualified in the field of anesthesia with regard to the anesthetic plan he formulated for MIKE MITCHELL or request that a physician competent in the field of anesthesia approve the anesthestic plan.

d) Was not supervised by any physician in the formulation of the anesthetic plan or prior to or during the induction of anesthesia to MIKE MITCHELL.

32. As a direct result of the above-described policies and custom, ADAMSON independently chose, prescribed and administered to MIKE MITCHELL well-known vasal dilators and cardiac depressants which, given MITCHELL's condition, caused MITCHELL's heart to stop completely. It was only after that cardiac arrest that a physician anesthesiologist was called in. By the time she arrived, MIKE MITCHELL had already suffered almost total brain damage.

33. MIKE MITCHELL died on January 10, 1990, as a result of his injuries.

34. When NWTH scheduled MITCHELL's surgery in response to BAAY's request, NWTH held itself out as being capable of providing the services necessary for that surgery and was aware that MIKE MITCHELL would rely upon that representation.

35. NWTH was also aware that MIKE MITCHELL's condition was deteriorating and knew or should have known that, by inducing MITCHELL to rely upon NWTH until his condition made it too late to seek care elsewhere, NWTH effectively deprived MIKE MITCHELL of the freedom to choose to go elsewhere for such services.

36. At the moment MIKE MITCHELL was taken to surgery he became totally dependent upon NWTH to provide the minimal care necessary to sustain his life. Defendant NWTH was aware of and accepted MITCHELL's dependency upon it. Upon entering surgery, NWTH assumed control of MIKE MITCHELL's very existence.

37. Before being taken into the operating room for the surgery to relieve the cardiac tamponade, MIKE MITCHELL was asked to sign a Consent Form agreeing to the surgery.

38. Defendant NWTH failed to in any way warn or otherwise advise MIKE MITCHELL that a CRNA would be formulating the anesthetic plan, ordering drugs and administering anesthesia without the supervision of a licensed physician and/or a physician qualified to supervise anesthesia.

39. MIKE MITCHELL was not aware of NWTH policies for the use of its CRNAs or of its failure to communicate and implement its written policy regarding the supervision of CRNAs, and MIKE MITCHELL did not voluntarily submit himself to the care of an unsupervised CRNA to perform his anesthesia.

40. Defendant NWTH knowingly, willfully and fraudulently represented, expressly and impliedly, to MIKE MITCHELL that its actions in allowing and/or encouraging ADAMSON to formulate the anesthetic plan, prescribe State and Federally controlled drugs and administer those drugs were taken pursuant to authority granted ADAMSON by the State of Texas. Those fraudulent representations were in strict violation of the Texas Controlled Substances Act, Vernon's Ann.Civ.St. art. 4476-15 et. seq.; the Texas Dangerous Drug Act, Vernon's Ann.Civ.St. art. 4476-14 et. seq.; the Texas Pharmacy Act, Vernon's Ann.Civ.St. art. 4542a-1 et. seq.; the Medical Practice Act, Vernon's Ann.Civ.St. art. 4495b et. seq.; 22 TAC §193.1 et. seq. and §221.1 et. seq.; and the Federal Controlled Substances Act, 21 U.S.C. §801 et. seq.

41. Defendant NWTH is an association for purposes of V.T.C.A. Penal Code §1.07 et. seq.

42. In allowing and encouraging ADAMSON and others to engage in the illegal practice of medicine, NWTH agreed with one or more other persons to engage in conduct that constituted a felony offense under the laws of the State of Texas, and NWTH and one or more other persons performed overt acts in furtherance of that agreement. The agreement and overt acts of NWTH constituted the offense of criminal conspiracy in violation of V.T.C.A. Penal Code §15.02 et. seq.

43. On and prior to the date of the incident from which this suit arises, Defendant NWTH, through its agents, servants and employees, billed patients, including MIKE MITCHELL, for anesthesia services illegally rendered by ADAMSON and other NWTH CRNAs which actions constitute theft under §31.01 et. seq. and §31.03 et. seq. V.T.C.A. Penal Code.

44. The illegal actions and omissions of NWTH as described above consititued negligence per se and were a proximate cause of and moving force behind the injuries and death of MIKE MITCHELL and the serious injuries and damages suffered by Plaintiffs for which they are entitled to relief.

SECOND CAUSE OF ACTION

45. Plaintiffs reallege the allegations of paragraphs 1 through 44 above as if fully set forth at this point.

46. NWTH's policies, custom and practice for the use of its CRNAs and its failure to communicate and/or implement its written policy regarding the supervision of CRNAs created clear, substantial and unjustifiable risks of injury to MIKE MITCHELL as well as other patients receiving anesthesia at NWTH.

47. NWTH knew or should have known of the grave risks posed by its policies, custom and practice and its failure to implement its written policy regarding the use of CRNAs, and NWTH was deliberately indifferent to those risks.

48. The actions of NWTH described above

constituted negligence under the laws of the State of Texas and were a proximate cause of and moving force behind the injuries and damages suffered by Plaintiffs for which they are entitled to relief.

THIRD CAUSE OF ACTION

49. Plaintiffs reallege the allegations of paragraphs 1 through 48 above as if fully set forth at this point.

50. The actions of NWTH described above manifested deliberate indifference to Plaintiffs' constitutionally protected rights and constituted conduct shocking to the conscience in violation of Plaintiffs' substantive rights under the 5th and 14th Amendments to the United States Constitution and Art. 1 §13 and §19 of the Texas Constitution not to be deprived of life and liberty without due process of law.

51. The deliberate indifference of NWTH described above was a proximate cause of and moving force behind the injuries and death of MIKE MITCHELL and the serious injuries and damages suffered by Plaintiffs as hereafter set forth for which they are entitled to relief pursuant to the Texas Constitution and 42 U.S.C. §1983.

FOURTH CAUSE OF ACTION

52. Plaintiffs reallege the allegations in paragraphs 1 through 51 above as if fully set forth at this point.

53. The policies, custom and practice of NWTH described above deprived Plaintiffs of their rights to

procedural due process under the 5th and 14th Amendments to the United States Constitution and Art. 1 §13 and §19 of the Texas Constitution.

54. The procedural due process violations of NWTH were a proximate cause of and moving force behind the serious injuries and damages suffered by Plaintiffs as hereafter set forth for which they are entitled to relief pursuant to 42 U.S.C. §1983.

FIFTH CAUSE OF ACTION

55. Plaintiffs reallege the allegations of paragraphs 1 through 54 above as if fully set forth at this point.

56. At all times relevant hereto, Defendant MARTIN, in his capacity as Director of Anesthesia for NWTH, was a policy making official for NWTH charged with making policy regarding the medical supervision of CRNAs employed by NWTH.

57. As Director of the Department of Anesthesia for NWTH, Defendant MARTIN was also charged with the overall medical supervision of the CRNAs employed by NWTH.

58. At all relevant times, Defendant MARTIN, pursuant to his policy making duties, adopted and carried out the written "first call" policy described above.

59. Pursuant to his policy making duties, Defendant MARTIN adopted and approved the written anesthesia department policy which stated, in pertinent part, "[when] the CRNA is working in the immediate absence of an

Anesthesiologist, the operating surgeon shall have the responsibility for the medical conduct of the anesthetist."

60. Defendant MARTIN failed to communicate that written policy to BAAY and other surgeons or otherwise ensure that the policy was carried out.

61. Defendant MARTIN knew or should have known that the operating surgeons were not qualified to carry out the duties assigned to them under the written policy.

62. Defendant MARTIN knew or should have known that the written policy posed obvious, substantial and unjustifiable risks of injury to MIKE MITCHELL and other patients receiving anesthesia at NWTH, and MARTIN was deliberately indifferent to those risks.

63. Defendant MARTIN knew or should have known that his failure to communicate and implement the written policy regarding the supervision of CRNAs posed obvious, substantial and unjustifiable risks of injury to MIKE MITCHELL and other patients receiving anesthesia at NWTH, and MARTIN was deliberately indifferent to those risks.

64. At all times relevant hereto, Defendant MARTIN was aware that it was the custom and practice of NWTH to permit CRNAs to formulate anesthetic plans and to prescribe and administer anesthetic drugs to patients without consulting with or otherwise being medically supervised by a qualified, licensed physician and without a physician's order.

65. Defendant MARTIN was also aware that the NWTH custom and practice permitting CRNAs to formulate anesthetic plans and prescribe and administer anesthetic

drugs without medical supervision posed obvious, substantial and unjustifiable risks of injury to MIKE MITCHELL and to other patients receiving anesthesia at NWTH.

66. Despite his awareness of these risks, Defendant MARTIN continued to allow the custom and practice under which CRNAs at NWTH formulated anesthetic plans and prescribed and administered anesthetic drugs to patients without medical supervision and with no physician's order or otherwise supervise the actions of CRNAs.

67. Defendant MARTIN participated in, allowed and encouraged ADAMSON and other CRNAs employed by NWTH to engage in acts which constitute the illegal practice of medicine in direct violation of the Texas Controlled Substances Act, Vernon's Ann.Civ.St. art. 4476-15 et. seq.; the Texas Dangerous Drug Act, Vernon s Ann.Civ.St. art. 4476-14 et. seq.; the Texas Pharmacy Act, Vernon's Ann.Civ.St. art. 4542a-1 et. seq.; the Medical Practice Act, Vernon's Ann.Civ.St. art. 4495b et. seq.; and the Federal Controlled Substances Act, 21 U.S.C. §801 et. seq.

68. Defendant MARTIN knowingly, willfully and fraudulently represented, expressly and impliedly, to MIKE MITCHELL that his actions in allowing and encouraging ADAMSON to formulate MITCHELL's anesthetic plan, prescribe State and Federally controlled drugs and administer those drugs were taken pursuant to authority granted ADAMSON by the State of Texas. Those fraudulent representations were in strict violation of the Texas Controlled Substances Act, Vernon's Ann.Civ.St. art. 4476-15 et. seq.; the Texas Dangerous Drug Act, Vernon's Ann.Civ.St. art. 4476-14 et. seq.; the Texas Pharmacy Act, Vernon's Ann.Civ.St. art. 4542a-1 et. seq.; the Medical Practice Act, Vernon's Ann.Civ.St. art. 4495b et. seq.; 22

TAC §193.1 et. seq. and §221.1 et. seq.; and the Federal Controlled Substances Act, 21 U.S.C. §801 et. seq.

69. In his allowing and encouraging ADAMSON and other CRNAs at NWTH to engage in the illegal practice of medicine, Defendant MARTIN agreed with one or more persons to engage in conduct which constitutes a felony offense under the laws of the State of Texas, and MARTIN and one or more other persons performed overt acts in furtherance of that agreement. MARTIN's actions in this regard constituted the offense of criminal conspiracy in violation of V.T.C.A. Penal Code §15.02.

70. The illegal actions and omissions of Defendant MARTIN as described above constituted negligence per se and were a proximate cause of and moving force behind the injuries and death of MIKE MITCHELL and the serious injuries and damages suffered by Plaintiffs for which they are entitled to relief.

71. In all of the actions described above, Defendant MARTIN was participating in a board, committee or society at NWTH.

SIXTH CAUSE OF ACTION

72. Plaintiffs reallege the allegations of paragraphs 1 through 71 above as if fully set forth at this point.

73. The actions and omissions of Defendant MARTIN as described above constitute negligence and were a proximate cause of and moving force behind the injuries and death of MIKE MITCHELL.

74. Defendant MARTIN's negligent acts and omissions as described above were a proximate cause of and moving force behind the serious injuries and damages suffered by Plaintiffs for which they are entitled to relief.

SEVENTH CAUSE OF ACTION

75. Plaintiffs reallege the allegations of paragraphs 1 through 74 above as if fully set forth at this point.

76. The actions of Defendant MARTIN as described above manifested deliberate indifference to Plaintiffs' constitutionally protected rights and constituted conduct shocking to the conscience in violation of Plaintiffs' rights under the 5th and 14th Amendments to the United States Constitution and Art. 1 §13 and §19 of the Texas Constitution not to be deprived of liberty without due process of law.

77. The above-described deliberate indifference of Defendant MARTIN was a proximate cause of and moving force behind the injuries and subsequent death suffered by MIKE MITCHELL and the severe injuries and damages suffered by Plaintiffs as detailed below for which they are entitled to relief pursuant to the Texas Constitution and 42 U.S.C. §1983.

EIGHTH CAUSE OF ACTION

78. Plaintiffs reallege the allegations of paragraphs 1 through 77 above as if fully set forth at this point.

79. The actions of Defendant MARTIN described

above violated Plaintiffs' procedural rights under the 5th and 14th Amendments to the United States Constitution and Art. 1 §13 and §19 of the Texas Constitution not to be deprived of life and liberty without due process of law.

80. The above described denial of procedural due process was a proximate cause of and moving force behind the injuries and subsequent death suffered by MIKE MITCHELL and the injuries and damages suffered by Plaintiffs for which they are entitled to relief pursuant to 42 U.S.C. §1983 and the Texas Constitution.

NINTH CAUSE OF ACTION

81. Plaintiffs reallege the allegations in paragraphs 1 through 80 above as if fully set forth at this point.

82. Defendants NWTH and MARTIN, acting under color of State law, deprived Plaintiffs of their rights under the Federal Controlled Substances Act, 21 U.S.C. §801 et. seq.

83. Defendants' violations of the Federal Controlled Substances Act were a proximate cause of and moving force behind the injuries and death of MIKE MITCHELL and the injuries and damages suffered by Plaintiffs for which they are entitled to relief pursuant to the Texas Constitution and 42 U.S.C. §1983.

TENTH CAUSE OF ACTION

84. The actions and omissions on the part of Defendants ADAMSON and BAAY as set forth above

constituted negligence, and their negligence was a p[roxi]mate cause of Plaintiffs' injuries and damages as [here]after described.

DAMAGES

85. As a direct and proximate result of De[fen]dants' negligence, illegal actions and deliberate indiffe[ren]ce, as more specifically set forth above, Plaintiffs have su[ffe]red the following injuries and damages:

86. MIKE MITCHELL was caused to [en]ter a persistive vegetative state on February 24, 1987, which state he remained until his death on January 10, 19[90].

87. MIKE MITCHELL lost any chan[ce] for a meaningful life. Plaintiffs specifically plead the Lo[st] Chance Doctrine.

88. MIKE MITCHELL suffered perma[nen]t and severe brain damage which destroyed his mental [func]tion from February 24, 1987, until his death on Jan[ua]ry 10, 1990.

89. MIKE MITCHELL lost all power of l[oco]motion and all ability to consciously move any portion of [his] body. He responded only to painful stimuli and, at ti[mes], to a familiar voice or touch.

90. MIKE MITCHELL required constant in[tra]venous feeding and invasive assistance for bodily funct[ion]s from February 24, 1987, until his death.

91. MIKE MITCHELL suffered great phy[sic]al and mental pain, suffering and anguish from February [24], 1987,

until his death on January 10, 1990.

92. MIKE MITCHELL suffered loss of mental and intellectual function from February 24, 1987, until his death on January 10, 1990.

93. MIKE MITCHELL suffered the loss of that affection, solace, comfort, companionship, society, assistance, advise, counsel and sexual relations from his wife JANET MITCHELL, all to which he had a natural right.

94. MIKE MITCHELL suffered lost earnings in the past.

95. MIKE MITCHELL suffered physical impairment in the past.

96. MIKE MITCHELL suffered disfigurement in the past.

97. MIKE MITCHELL suffered the loss of household services in the past.

98. MIKE MITCHELL suffered the loss of his life.

99. The negligence, illegal acts and deliberate indifference of Defendants NWTH and MARTIN as set out herein constitute unwarranted State interference with MIKE MITCHELL's right to familial relationship in violation of MIKE MITCHELL's rights under the 5th and 14th Amendments to the United States Constitution and under the Texas Constitution.

100. Plaintiff JANET MITCHELL lost her husband of 20 years. The last three years of his life she spent

visiting him almost daily in the hospital. She has suffered tremendously, both physically and mentally as a direct result of the incident described herein. She is in constant grief, depression and bereavement. She has had drastic personality changes, she has nightmares, she cries, she suffers from constant nervousness, nausea, irritability, and her physical and mental health have deteriorated. She will, in all reasonable probability, so suffer for tho rest of her natural life.

101. JANET MITCHELL has been deprived of her husband's love, affection, solace, comfort, advise, counsel, assistance, companionship, society and sexual relations, each to which she has a natural right.

102. JANET MITCHELL has suffered loss of earnings in the past, and she will, in all probability, suffer loss of wage earning capacity in the future.

103. JANET MITCHELL has suffered the total loss of care, maintenance, support, services, advise, counsel and contributions of pecuniary value that her husband would have been expected to provide were it not for the incidents described herein leading to his death. JANET MITCHELL will, within reasonable probability, continue to suffer these losses.

104. JANET MITCHELL Individually and as Personal Representative and Heir of
the ESTATE OF MIKE MITCHELL has been caused to incur reasonable and necessary medical expenses which are in excess of $1,500,000.00.

105. JANET MITCHELL was caused to incur reasonable and necessary funeral and burial expenses in the

amount of $7,200.00.

106. JANET MITCHELL has suffered the loss of household services that MIKE MITCHELL would have provided.

107. JANET MITCHELL, as a legal beneficiary of MIKE MITCHELL, has suffered the loss of inheritance.

108. The negligence, illegal actions and deliberate indifference of Defendants NWTH and MARTIN as set out herein constitute unwarranted State interference with the familial relationship that, prior to the incident described herein, existed between JANET MITCHELL and MIKE MITCHELL, in violation of JANET MITCHELL's rights under the 5th and 14th Amendments of the United States Constitution and of the Texas Constitution.

109. MIKE MITCHELL was 35 years old at the time of the incident causing his condition and death as detailed previously. He was the natural father of two children, namely VALERIE NICOLE, age 8 at the time, and CLAYTON LEE, age 4. MIKE MITCHELL was a model father. He was loving and completely dedicated to his family. He was married, only once, to JANET MITCHELL, the natural mother of VALERIE and CLAYTON. MIKE and JANET MITCHELL were never divorced or separated. They were rarely apart from one another or the kids. MIKE MITCHELL provided for his family in every possible way, both emotionally and financially.

110. VALERIE NICOLE MITCHELL, now age 11, is overwhelmed by anxiety, depression and confusion, torment, suffering and great emotional pain, grief and bereavement due to the ongoing tragedy of her father's

condition and his ultimate death. She was deeply attached to her father and has suffered great agony at witnessing and trying to cope with his condition and is suffering unbearable pain and confusion at his death. Her suffering will in all likelihood continue long into the future if not for the remainder of her life.

111. VALERIE NICOLE MITCHELL has lost any hope of ever having a meaningful relationship with her father. She has forever lost the care, maintenance, support, services, education, advise, counsel and reasonable contributions of pecuniary value she would have, in reasonable probability, received from her father were it not for his condition and ultimate death. She has suffered these losses in the past and will, in all reasonable probability, so suffer long into the future, if not for the rest of her natural life.

112. VALERIE NICOLE MITCHELL has suffered the loss of the positive benefits from the love, comfort, companionship and society she would have in all reasonable probability experienced were it not for her father's condition and death. Her suffering will continue long into the future if not for the rest of her natural life.

113. The negligence, deliberate indifference, fraud and illegal actions of Defendants NWTH and MARTIN as described herein constitute unwarranted State interference with the familial relationship that, prior to the incident described herein, existed between VALERIE NICOLE MITCHELL and her father. Such interference is in violation of VALERIE NICOLE MITCHELL's rights under the 5th and 14th Amendments to the Constitution of the United States and under the Texas Constitution.

114. VALERIE NICOLE MITCHELL, as a legal beneficiary of MIKE MITCHELL, has suffered the loss of inheritance.

115. CLAYTON LEE MITCHELL, now 7 years old, suffers severe anxiety, depression and confusion, torment, suffering and great emo[illegible]al pain, grief and bereavement due to the ongoing tragedy of his father's condition and ultimate death. CLAYTON LEE MITCHELL will suffer these emotions and losses long into the future and in all probability for the rest of his natural life.

116. CLAYTON LEE MITCHELL has lost any chance for a meaningful relationship with his father. He has forever lost the care, maintenance, support, services, education, advise, counsel and reasonable contributions of pecuniary value he would have, in reasonable probability, received from his father were it not for his father's condition and ultimate death. He has suffered these losses in the past and will, in all reasonable probability, so suffer long into the future, if not for the rest of his natural life.

117. CLAYTON LEE MITCHELL has suffered the loss of the positive benefits from the love, comfort, companionship and society he would have in all reasonable probability experienced were it not for his father's condition and death. He will in reasonable probability suffer these losses long into the future if not for the rest of his natural life.

118. The negligence, deliberate indifference, fraud and illegal actions of Defendants NWTH and MARTIN as described herein constitute unwarranted State interference with the familial relationship that, prior to the incident described herein, existed between CLAYTON LEE

MITCHELL and his father. Such interference is in violation of CLAYTON LEE MITCHELL's rights under the 5th and 14th Amendments of the Constitution of the United States and under the Texas Constitution.

119. CLAYTON LEE MITCHELL, as a legal beneficiary of MIKE MITCHELL, has suffered the loss of inheritance.

120. DALE MITCHELL shared an extremely close father/son relationship with his son. He has suffered great torment, agony, bereavement, sorrow, depression, anxiety and deep emotional and physical pain at his son's condition and death. He will, in all probability, continue to so suffer long into the future if not for the remainder of his life.

121. DALE MITCHELL has forever lost the care, maintenance, support, services, advice, counsel and contributions of pecuniary value that he would have in reasonable probability received from his son were it not for his son's condition and death. He has suffered these losses in the past, and he will, in all probability, suffer these losses long into the future if not until his own death.

122. DALE MITCHELL has suffered the loss of the positive benefits flowing from the love, comfort, companionship and society he would have in reasonable probability received from his son MIKE MITCHELL were it not for his son's condition and death. DALE MITCHELL has suffered these losses since the incident described herein, and he will, in all probability, so suffer long into the future if not for the rest of his natural life.

123. The acts and omissions of Defendants NWTH and MARTIN as set forth herein constitute unwarranted State

interference with the familial relationship that, prior to the incident, existed between Plaintiff DALE MITCHELL and his son MIKE MITCHELL in violation of DALE MITCHELL's rights under the 5th and 14th Amendments to the United States Constitution and under the Texas Constitution.

124. DALE MITCHELL, as a legal beneficiary of MIKE MITCHELL, has suffered the loss of inheritance.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays: for jury hearing hereof; that once Defendants' legal liability has been established, she have jury verdict against Defendants, jointly and severally, for the full amount of her damages and thereafter judgment on the jury verdict; for punitive damages in an amount found proper under these facts and circumstances; for pre-judgment and post-judgment interest at the highest rate allowed by law; for attorney's fees as provided pursuant to 42 U.S.C. §1988; for costs of court; and for such other and further relief, special or general, at law or in equity, to which she may show herself justly entitled.

Respectfully submitted,

HOFFMAN, SHEFFIELD & SAUSEDA
1008 S. Madison
Amarillo, Texas 79101
(806) 376-8903

Edward J. Tuddenham

1004 West Avenue
Austin, Texas 78701
(512) 479-5017

/S/
Mike Sheffield
State Bar No. 18184600

CERTIFICATE OF SERVICE

I do hereby certify that on the 10th day of September, 1990, true and correct copies of Plaintiffs' First Amended Petition After Consolidation served upon all parties in accordance with Rule 21a, T.R.C.P.

/S/
Mike Sheffield

Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

No. 94-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, Deceased; JANET MITCHELL as Next Friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her Minor Children; and DALE MITCHELL,

Petitioners,

vs.

AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his official capacity as Medical Director of the Department of Anesthesia of AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; and RAYMOND A. MARTIN, M.D., P.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION OF RESPONDENT, AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL

THOMAS C. RINEY (COUNSEL OF RECORD)
KENNETH S. MUNCY
GIBSON, OCHSNER & ADKINS, L.L.P.
500 BOATMEN'S FIRST NATIONAL BANK BUILDING
AMARILLO, TEXAS 79101
(806) 372-4271
FAX: 378-9797
Attorneys for Respondent

16 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the treatment of a voluntary patient by a hospital which happens to be part of a governmental hospital district transforms a state law medical malpractice tort claim into a cause of action under 42 U.S.C. §§ 1983 *et seq.* merely because the hospital is a governmental entity.

PARTIES

Counsel of record certifies that the following list of persons have a direct interest in this case:

Petitioners/Plaintiffs:

1. JANET MITCHELL on behalf of herself, the Estate of Mike Mitchell, Deceased, and her minor children, VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL.

2. DALE MITCHELL, father of Mike Mitchell, Deceased.

Respondents/Defendants:

1. AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL.

2. RAYMOND A. MARTIN, M.D., Individually and in his official capacity as Medical Director of the Department of Anesthesia of AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL.

3. RAYMOND A. MARTIN, M.D., P.A.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENTS AND AUTHORITIES 5

I. REASONS FOR DENIAL OF WRIT OF CERTIORARI 5

II. PETITIONERS FAILED TO ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF SUBSTANTIVE DUE PROCESS RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT ... 7

III. PETITIONERS FAILED TO ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF PROCEDURAL DUE PROCESS RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT 8

CONCLUSION AND PRAYER 10

TABLE OF AUTHORITIES

Page

Cases:

Baker v. McCollan,
443 U.S. 137, 99 S. Ct. 2689 (1979) 7

Bradberry v. Pinnales County,
789 F.2d 1513 (11th Cir. 1986) 7

Collins v. City of Harker Heights,
503 U.S. ___, 112 S. Ct. 1061 (1992) 5-8, 10

Lewellen v. Metropolitan Gov't of Nashville and Davidson County, Tennessee, No. 93-5061, 1994 WL 459270
(6th Cir. Tenn., Aug. 25, 1994) 6

Zinnernon v. Birch,
494 U.S. 113 (1990) 9

Statutes:

TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 *et seq.* 2-4

Codes:

42 U.S.C. § 1983 ..... 2-4, 6, 7, 10

No. 94-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JANET MITCHELL, Individually and as Personal Representative and Heir of the Estate of MIKE MITCHELL, Deceased; JANET MITCHELL as Next Friend of VALERIE NICOLE MITCHELL and CLAYTON LEE MITCHELL, her Minor Children; and DALE MITCHELL,

Petitioners,

vs.

AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; RAYMOND A. MARTIN, M.D., Individually and in his official capacity as Medical Director of the Department of Anesthesia of AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL; and RAYMOND A. MARTIN, M.D., P.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION OF RESPONDENT, AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL

TO THE HONORABLE SUPREME COURT:

The Respondent, AMARILLO HOSPITAL DISTRICT d/b/a NORTHWEST TEXAS HOSPITAL, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW

The Order of the 181st Judicial District Court in and for Potter County, Texas dismissing Petitioners' First Amended Petition After Consolidation is not published but is reproduced in the Appendix to Mitchell's Petition for Writ of Certiorari at A-41. The opinion of the Seventh Court of Appeals of Texas is published at 855 S.W.2d 857 and is reproduced in the Appendix to Mitchell's Petition for Writ of Certiorari at A-3. The Orders of the Supreme Court of Texas denying Petitioners' Application for Writ of Error and Motion for Rehearing of the Application for Writ of Error were not published but are reproduced in the Appendix to Mitchell's Petition for Writ of Certiorari at A-1 and A-2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States.

2. 42 U.S.C. § 1983.

3. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 *et seq.*

STATEMENT OF THE CASE

Amarillo Hospital District is a governmental subdivision of the State of Texas which owns and operates Northwest Texas Hospital in Amarillo, Texas. On the evening of February 24, 1987, Mike Mitchell was admitted to Northwest Texas Hospital by Dr. Marc Tuel. Mr. Mitchell had previously undergone heart surgery at another

hospital. He was thought to be suffering from a cardiac tamponade, a serious health risk related to the surgery. Mr. Mitchell's surgeon, Dr. John Baay, and other physicians determined that immediate surgical correction of the cardiac tamponade was necessary, so more surgery was performed that evening. The anesthesia was administered by James Adamson, a Certified Registered Nurse Anesthetist (CRNA). Adamson was a member of the American Association of Nurse Anesthetists and was licensed by the Texas Board of Nurse Examiners. During the surgical procedure, Mr. Mitchell suffered a cardiac arrest and subsequently died on January 10, 1990.

Petitioner Janet Mitchell initially brought suit individually and as guardian of her husband, Mike Mitchell, and their children against Anderson, Baay, and the hospital. This suit originally alleged only negligent medical care. Petitioners amended their pleadings to add Respondent Martin and to allege a claim against Amarillo Hospital District for violation of 42 U.S.C. § 1983. AHD specially excepted to the Section 1983 claims and the trial court sustained the exceptions. Petitioners attempted to replead their Section 1983 claims in several amended petitions. Amarillo Hospital District specially excepted to each of Petitioners' Section 1983 allegations, and each time the trial court sustained the special exceptions. Eventually, Petitioners settled their claims against Adamson and Baay for $1,200,000.00. Petitioners again amended their pleadings, continuing to assert claims against Amarillo Hospital District under 42 U.S.C. § 1983, but abandoning their claims against Amarillo Hospital District under the Texas Tort Claims Act (TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 *et seq.*). Amarillo Hospital District again excepted to Petitioners' petition, the trial court granted the exceptions, Petitioners elected to stand on their

pleadings, and the trial court thereupon dismissed all claims against Amarillo Hospital District.

Amarillo Hospital District very strongly challenges the scurrilous factual allegations made against it by Petitioners in their pleadings and in their Application for Writ of Certiorari. Amarillo Hospital District acknowledges, however, that the factual allegations in the pleadings, however groundless they may be, are accepted as true for the purposes of the special exceptions. Amarillo Hospital District will, therefore, not undertake to challenge each of the incorrect assertions of fact made by Petitioners. However, the factual issues actually involve only the following: whether James Adamson made an appropriate choice of anesthetic agents, whether he monitored appropriately, and whether, upon evaluating Mr. Mitchell's condition, he should have contacted the anesthesiologist on call for a consultation.

These issues involve merely an ordinary tort law medical malpractice case. Amarillo Hospital District, as a governmental unit, is immune from such claims under the doctrine of sovereign immunity, except to the extent its immunity is waived under the provisions of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 *et seq.* Amarillo Hospital District's liability is limited to the amount of $100,000.00 under the Texas Tort Claims Act. Petitioners are attempting to turn this ordinary state tort law medical malpractice case into a constitutional claim under 42 U.S.C. § 1983 so as to avoid the damage limitations under the Texas Tort Claims Act.

SUMMARY OF THE ARGUMENT

I. Reasons for denial of Writ of Certiorari.

II. Petitioners failed to allege a cause of action for deprivation of substantive due process rights in violation of the Fourteenth Amendment.

III. Petitioners failed to allege a cause of action for deprivation of procedural due process rights in violation of the Fourteenth Amendment.

ARGUMENTS AND AUTHORITIES

I.
REASONS FOR DENIAL OF WRIT OF CERTIORARI

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. This case presents no novel question of law and the courts below fully considered and correctly decided the issues under this Court's prior controlling decisions. The decisions of the trial court, the Texas Court of Appeals, and the Texas Supreme Court below do not decide a federal question in a way that conflicts with the applicable decisions of this Court or of any of the federal courts of appeals. This case merely represents an effort on the part of Petitioners to transform an ordinary state tort law medical malpractice case into a Section 1983 constitutional claim in order to avoid the damage limitations applicable under state law.

This Court addressed issues very similar to the question at issue in this case in *Collins v. City of Harker Heights,* 503 U.S. ____, 112 S. Ct. 1061 (1992). Petitioners

seek to use this Court's scarce judicial resources to clarify *Collins* for them even though the trial court, Texas Court of Appeals, and Texas Supreme Court had no difficulty interpreting it. Furthermore, the recent decision in the Sixth Circuit case, *Lewellen v. Metropolitan Gov't of Nashville and Davidson County, Tennessee,* No. 93-5061, 1994 WL 459270 (6th Cir. Tenn., Aug. 25, 1994), demonstrated that courts are having no difficulty applying *Collins* appropriately.

Collins rejected efforts to transform ordinary tort law claims into constitutional claims under the guise of 42 U.S.C. § 1983. In *Collins*, this Court enunciated a test which has been uniformly applied since *Collins* and was specifically applied by the Texas Court of Appeals in this case. This Court held in *Collins* that for governmental conduct to rise to the level of constitutional dimensions, it must "shock the conscience *in a constitutional sense.*" (Emphasis added.) Petitioners focus on the "shocks the conscience" portion of the *Collins* test. Petitioners treat this language like another level of culpability such as negligence, recklessness, or deliberate indifference. They have simply not grasped the importance of the rest of the *Collins* test. The culpable conduct must shock the conscience *in a constitutional sense.* Petitioners have made repeated bold attempts to allege egregious conduct rising to the level of culpability which "shocks the conscience," but they have consistently failed to allege conduct that is culpable in a constitutional sense, so as to distinguish it from an ordinary state law medical malpractice tort. The *Collins* test is clear, it was applied correctly in this case, and no further amplification of it is necessary.

II.
PETITIONERS FAILED TO ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF SUBSTANTIVE DUE PROCESS RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT

The first inquiry in any Section 1983 case is whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States. If there has been no such deprivation, the state of mind of the defendant is wholly immaterial. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689 (1979). The allegation of a *constitutional deprivation* is the threshold requirement of Section 1983 liability that Petitioners have failed to meet in this case.

Amarillo Hospital District is not liable under Section 1983 for any harm allegedly caused by its anesthesia policy simply because it is a governmental hospital. Petitioners' Section 1983 claims are an attempt to litigate a state law tort claim as a federal constitutional claim under the guise of 42 U.S.C. § 1983. *Bradberry v. Pinnales County*, 789 F.2d 1513, 1514 (11th Cir. 1986).

These issues were decided in *Collins* and need not be revisited in this case. In *Collins*, the Court rested its refusal to characterize the city's alleged omissions as arbitrary in a constitutional sense "on the presumption that the administration of government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces." 112 S. Ct. at 1070. The Court noted that decisions concerning aspects of a sewer maintenance program in the City of Harker Heights should be made by locally elected representatives rather than by federal judges interpreting the

basic charter of government for the entire country. The same is obviously true for the decisions regarding various aspects of running a hospital and providing anesthesia for operating rooms by a hospital district. The courts below were guided by the clear and applicable provisions of *Collins*. Petitioners are dissatisfied with the result of their case in light of *Collins* and therefore seek a re-interpretation in hopes of achieving a more favorable result. This is not called for, it is unnecessary, and it is improper.

III.
PETITIONERS FAILED TO ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF PROCEDURAL DUE PROCESS RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT

Just as Petitioners failed to allege a substantive due process violation in this case, they also have no procedural due process claim. Petitioners are obviously dissatisfied with the analysis of their procedural due process claim in the courts below. However, Petitioners' Petition for Writ of Certiorari fails to demonstrate any need for further review of that analysis in this Court.

Like their substantive due process claim, Petitioners' procedural due process claim, when cast in its most favorable light, is still, at most, analogous to the ordinary state law tort of failure to obtain informed consent. Such a claim does not rise to misconduct "in a constitutional sense." *Collins* does not distinguish between substantive and procedural due process in holding that constitutional violations must be conscience-shocking in a constitutional sense. There is no indication that the decision in *Collins* would somehow have been different had there been an

allegation that the conduct was a violation of procedural, as well as substantive, due process.

Petitioners erroneously state that this case is indistinguishable from *Zinnernon v. Birch*, 494 U.S. 113 (1990). On the contrary, the distinction is obvious. *Zinnernon* involved the *intentional* confinement of a patient by a state hospital. The present case involves an *unintended* poor outcome of a hospital surgical patient. The *Zinnernon* procedural due process analysis examines the procedures employed leading up to the confinement of the mental patient. Such an analysis is inappropriate when examining the treatment rendered to a patient who suffers an unintended adverse medical result. A procedural hearing process, in the face of the medical emergency Mike Mitchell faced, is inappropriate and, under the circumstances, the post-deprivation remedies available to him and Petitioners is constitutionally adequate. Furthermore, Petitioners have taken advantage of their post-deprivational remedies settling their tort claims against the nurse anesthetist and surgeon for $1,200,000.00. Additionally, Petitioners had an additional remedy against Respondent Amarillo Hospital District under the Texas Tort Claims Act but have abandoned that remedy in their pursuit of a higher monetary award.

The review of Petitioners' procedural due process claims in the courts below was consistent with the Fourteenth Amendment to the United States Constitution and the opinions of this Court construing that amendment. Petitioners' dissatisfaction with the result in the courts below does not warrant the discretionary jurisdiction of this Court.

CONCLUSION AND PRAYER

The courts below correctly held that Petitioners have failed to allege the deprivation of constitutional rights and have not pleaded a cause of action against Amarillo Hospital District under 42 U.S.C. § 1983. The decision of the courts below are not in conflict with the opinions of this Court, particularly *Collins v. City of Harker Heights.*

Amarillo Hospital District prays that the Court deny Petitioners' Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review, and because the lower courts' holdings were not in error.

Respectfully submitted,

THOMAS C. RINEY
TEXAS BAR NO. 16935100

KENNETH S. MUNCY
TEXAS BAR NO. 14664550

GIBSON, OCHSNER & ADKINS, L.L.P.
500 BOATMEN'S FIRST NATIONAL
BANK BUILDING
AMARILLO, TEXAS 79101
(806) 372-4271
FAX: 378-9797

Attorneys for Respondent,
Amarillo Hospital District d/b/a
Northwest Texas Hospital

Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

(3)

No. 94-515

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

JANET MITCHELL, et al,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MARTIN'S BRIEF IN OPPOSITION

Don M. Dean
Kelly Utsinger
UNDERWOOD, WILSON, BERRY, STEIN & JOHNSON, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158
(806) 376-5613
(806) 379-0316 - FAX

20 pp

PARTIES TO THE PROCEEDINGS

Counsel of record certifies that the following listed persons have a direct interest in this case:

Petitioners/Plaintiffs

1. Janet Mitchell on behalf of herself, the estate of Mike Mitchell, deceased, and her minor children, Valerie Nicole Mitchell and Clayton Lee Mitchell.

2. Dale Mitchell, father of Mike Mitchell, deceased.

Respondents/Defendants

1. Amarillo Hospital District doing business as Northwest Texas Hospital.

2. Raymond A. Martin, M.D. individually and in his capacity as Director of the Department of Anesthesia of Amarillo Hospital District.

3. Raymond A. Martin, M.D., P.A.

TABLE OF CONTENTS

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS TO REFUSE THE WRIT 5

1. *The substantive due process pleading standard needs no clarification and this case would only confuse the pleading process* 5

2. *Conscience shocking criticisms do not warrant a revision of substantive due process review in this case* 8

3. *Substantive due process analysis in non-custodial settings would not be advanced in this case* 9

4. *The pleadings in this case do not warrant this Court's review* 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Collins v. The City of Harker Heights, Tx, 503 U.S. 112 S.Ct. 1061, 117 L.Ed.2d. 261 (1992) 5

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. ____, 107 L.Ed.2d. 420, 427 11

Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 28, 101, S.Ct. 2615, 69 L.Ed.2d. 435 (1985) 11-12

Pembaur v. Cincinnati, 475 U.S. 469, 89 L.Ed.2d. 452, 106 Ct. 1292 (1986) 8

Planned Parenthood v. Casey, 505, 120 L.Ed.2d. 674, 697, 112 S. Ct. (1992) 10

Reno v. Flores, 507 U.S. 123 L.Ed.2d. 1, 16, 13 S Ct. (1993) 6

Zinermon v. Burch, 494 U.S. 113 (1990) 14

TABLE OF AUTHORITIES
(Continued)

Statutes and Miscellaneous

Federal Controlled Substances Act, 21 U.S.C. § 801 . . . . . 2, 4, 10, 11

H.R. Rep. No. 91-144, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567 . . . . . 11, 12

Texas Medical Practice Act, Tex. Rev. Civ. Stat. Ann. Art. 4495b, § 306(d) 4

No. 94-515

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1994

JANET MITCHELL, et al,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al

Respondents

DEFENDANT MARTIN'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JURISDICTION

Respondent Martin maintains that this Court's jurisdiction should not be invoked under 28 U.S.C. § 1254(1) (1988) because this case does not arise from the "courts of appeals." See 28 U.S.C. § 1291. Petitioners' stated grounds for review are therefore insufficient to invoke the jurisdiction of this Court.

STATEMENT OF THE CASE

This is a medical negligence suit originally filed against a surgeon, Dr. Baay; nurse anesthetist Adamson; Northwest Texas Hospital, "the Hospital"; and the Hospital's director of anesthesiology, Dr. Martin.[1] No constitutional contentions are properly asserted under the undisputed facts. Petitioners sued Dr. Martin, the titular director of anesthesia at the hospital, under theories of negligence per se and fraud (fifth cause of action), negligence (6th cause of action), violations of Mike Mitchell's substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 §§ 13 and 19 of the Texas Constitution, seeking recovery under 42 U.S.C. § 1983 (7th and 8th causes of action) and infringement of rights under the Federal Controlled Substances Act, 21 U.S.C. § 801 et seq., alleging a civil rights claim under 42 U.S.C. § 1983.

Petitioners' Statement of Facts correctly describes the disposition of Petitioners' suit before the District Court, Court of Appeals and the Texas Supreme Court. Although Respondent Martin maintains that the Court of Appeals was in error in its determination that he was acting under a color of state law, the ultimate resolution of the case, rejecting the federal and state co[illegible] claims, was correct. Accordingly, Dr. Martin did not raise by motion for rehearing or application

---

[1] Nurse Anesthetist Adamson and operating room physician Baay settled their claims with the Mitchells. (Petitioners' A-12). Although the substantive pleaded facts, Petitioners' A-49-79, assert negligence allegations against the hospital and Martin, these pleadings expressly exclude any claims against the hospital under the Texas Tort Claims Act. (See Tex. Civ. Prac. & Rem. Code §§ 101.023 and 102.003, placing monetary limitations upon the amounts which can be recovered against state or local governmental entities.)

for writ of error to the Texas Supreme Court the color of law determination by the Court of Appeals.[2]

The decision of the Court of Appeals outlines certain undisputed facts which, when understood, makes suspect the allegations contained in Petitioners' pleadings.

1. Martin's Motion for Summary Judgment alleged that he was contractually bound by an employment agreement with the hospital from December 1, 1986 to January 1, 1987, but had refused to extend the terms and conditions of his contract from January 1, 1987 to March 1, 1987. Mitchell was hospitalized on February 24, 1987. (Petitioners' A-7).[3]

2. Martin contended that he served only as an administrative scheduler, was not on call when Mitchell's surgery was performed and had no doctor-patient relationship with Mitchell. (Petitioners' A-7).

---

[2] From a procedural standpoint, the dismissal of this suit based upon the failure to properly plead a cause of action under 42 U.S.C. § 1983 and the granting of the Motion for Summary Judgment on state court claims made it unnecessary for Martin to complain on appeal about acting-under-color-of-law determination. The capacities in which Martin has been sued and any potential liability associated with them is denied by Martin. Whether Martin was acting under color of state law when Mitchell was treated is a matter which turns on the facts. Because such contested factual determinations were unnecessary to the resolution of the issues in dispute, Martin has not challenged the color-of-law determination of the Court of Appeals at this time. Martin, however, does not waive his contention that he was not acting under color of state law and expressly reserves the right to assert such contentions in the event a trial on the merits ever occurs.

[3] No joint appendix has been filed. All record references in this response are the Petitioners' Appendix pages.

3. In his official position, Martin was administering the existing scheduling policy of the hospital. He did not have the authority to change the policy. He had suggested a change that would have placed anesthesiologists rather than CRNA's on first call, but the hospital's policy was not changed. Martin was therefore not responsible for establishing the final policy for scheduling anesthesia. According to the policy which he administered, Martin scheduled CRNA Adamson on first call on the date of Mitchell's surgery. (Petitioners' A-37).

4. Martin was not present for Mitchell's surgery. He could not have made the final decision concerning personnel to administer anesthesia. Nothing in the record shows that Martin knew or had reason to know of any risk presented to Mitchell. (Petitioners' A-38).

5. According to the hospital anesthesia policy, the operating surgeon has the option to determine the personnel needed to administer anesthesia. Baay, who is in the best position to foresee the need for an anesthesiologist, made no request for an anesthesiologist. (Petitioners' A-37 - A-38).

6. The Court of Appeals correctly noted that under the Texas Medical Practice Act, Tex. Rev. Civ. Stat. Ann. Art. 4495b, § 306(d) that a physician is authorized "to delegate to any qualified and properly trained person" the act of administering dangerous drugs. (Petitioners' A-39). Petitioners have not alleged that Adamson by his CRNA certification was not such a person.

7. The Court of Appeals similarly correctly determined that the Federal Controlled Substances Act, 21 U.S.C. §§ 829, 841 (1988) neither granted a private right nor provided a cause of action to the Petitioners. Because no

federal right was asserted, no § 1983 action under the Federal Controlled Substances Act was available to Petitioners. (Petitioners' A-34).

8. Mitchell was voluntarily admitted to the hospital with a heart condition requiring immediate and necessary medical treatment. Mitchell signed a consent form before surgery which, given his condition at the time of admission, was constitutionally adequate as to due process. (Petitioners' A-31 - A-32).

9. Petitioners' pleadings allege common law negligence, not the deprivation of constitutionally protected life, liberty or property interests. Petitioners' allegations cannot be characterized as arbitrary, or conscious shocking, in a constitutional sense. (Petitioners' A-26).

REASONS TO REFUSE THE WRIT

1. *The substantive due process pleading standard needs no clarification and this case would only confuse the pleading process.*

Arguing that the writ should be granted because inferior courts have failed to follow *Collins v. The City of Harker Heights, Tx*, 503 U.S. ____, 112 S.Ct. 1061, 117 L.Ed.2d. 261 (1992), petitioners invite this Court to redefine constitutional torts in non-custodial settings. Assuming for the sake of argument that lower courts have failed to properly apply the *Collins'* "conscious-shocking," "arbitrary" substantive due process considerations, this contention does not justify revisiting this Court's pronouncements in a non-custodial, medical negligence suit. If lower courts have chosen to elevate traditional tort law to constitutional proportions by their decisions, those determinations are

contrary to the clear expression of this Court in *Collins.* The *Collins* fact scenario does not raise such sufficiently distinguishable facts so as to warrant reconsideration of the substantive due process pleading requirements here. Both in *Collins* and the instant case, policy decisions which should best be left to the governmental entities themselves without federal judicial or constitutional interference have been challenged.

Neither case presents a legal right worthy of a substantive due process claim. Any substantive due process analysis must begin with a careful description of the asserted right, because the doctrine of judicial self-restraint should be exercised with the utmost care. *Reno v. Flores,* 507 U.S. ____ 123 L.Ed.2d. 1, 16, 13 S Ct. _____ (1993). Petitioner has failed to articulate in her pleadings, as well as her petition to this Court, a right so fundamental to liberty interests to invoke the Fourteenth Amendment's guaranty of due process of law. When reduced to its basic terms, the right asserted by Petitioners is to be informed while in the throes of a cardiac emergency that a certified nurse anesthetist, under the supervision of an operating room physician, might administer anesthesia. The due process clause has never been, nor should it ever be, construed to encompass such a circumstance.

In *Collins,* the city's failure to train or warn its employees about danger in the work place was in issue. No fundamental liberty right was presented. Here, the scheduling of a nurse anesthetist rather than an anesthesiologist is the policy in issue. No fundamental liberty interest is raised. Neither *Collins* nor this case present Fourteenth Amendment guarantees of due process of law which justify "breaking new ground in the field." *Collins,* 117 L.Ed.2d. 273.

The "arbitrary" or the "conscience shocking" standard needs no further clarification in the context of the instant suit. This Court has clearly indicated that the due process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Collins,* 112 S.Ct. at 1070. Petitioners' attempt to cloak a medical negligence suit in Fourteenth Amendment raiment is designed to federalize medical malpractice suits. As correctly noted by this Court, the due process clause should not be so extended.

Explaining that arbitrary in a constitutional sense involves the presumption that the administration of government programs is based on a rational decision-making process that takes account of competing social, political and economic forces, this Court has provided sufficiently specific guidelines for asserting substantive due process claims which rise to the level of constitutional torts. *Collins,* 117 L.Ed.2d. 275. In the context of this suit, the policy choices regarding treatment of voluntarily admitted patients are far better suited for the Hospital's medical staff than "federal judges interpreting the basic charter of Government for the entire country." *Collins,* 117 L.Ed.2d. 275.

Moreover, this Court in *Collins* explained that from a historical perspective, the due process clause was intended to secure the individual from the arbitrary exercises of the powers of government. Neither the text nor the history of the due process clause support liberty deprivation allegations when voluntary acts resulting in personal harm are involved. *Collins,* 117 L.Ed.2d. 274.

When the rules articulated in *Collins* are viewed against the background of the pleadings of the Petitioner, substantive due process allegations require no additional

clarification on these facts. Petitioner's first reason for granting the writ should be denied. Given the pleadings in this case, substantive due process deprivations are not sufficiently alleged to suggest the commission of a tort of constitutional proportions.

2. *Conscience shocking criticisms do not warrant a revision of substantive due process review in this case.*

Ignoring the language of *Collins* that applied a disjunctive "arbitrary" or "shock-the-conscience" standard, Petitioners suggest in their second reason for granting writ that prior concurring opinions of this Court have been critical of applying a "shock-the-conscience" standard. None of the cited cases challenged the application of this standard in a non-custodial, voluntary circumstance involving allegations of due process violations. Granting the writ in this case would not provide a suitable context for clarifying the standard.

Before a frontal assault is mounted against the shock-the-conscience standard, perhaps this Court should consider the pleaded allegations against Martin. None are grounded on conventional due process violations. No fundamental liberty interest is articulated; no policy made by Martin is challenged.

Mitchell presented himself voluntarily for treatment for cardiac failure. He was never in the custody of Martin. He was not deprived of his liberty by Martin. He was never treated or seen by Martin.

Martin was not "responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. Cincinnati,* 475 U.S. 469, 89 L.Ed.2d. 452, 106

Ct. 1292 (1986). Martin, whose contract as Director of Anesthesia had expired, had suggested a policy change but was without authority to enact it. He was only a scheduler, acting in accordance with a policy which he neither established nor had the authority to change.

Under any definition of due process, Martin's actions could never be conscience shocking. Criticisms of this standard do not justify redefining due process theories based upon the acts of Martin.

Petitioners' challenge to the vagueness of the shock-the-conscience standard as it relates to Martin is designed to distract this Court's attention from the fundamental factual allegations raised by the pleadings. Martin did nothing which could be construed to present a liberty deprivation under the due process clause. His behavior was not arbitrary. It was not conscience-shocking. Petitioners' case-specific request for a more precise definition of conscience shocking is of no moment when this Court considers the allegations against Martin. Petitioners' second reason for granting the writ is unwarranted as to Martin.

3. *Substantive due process analysis in non-custodial settings would not be advanced in this case.*

No fundamental liberty right sufficient to touch upon the Fourteenth Amendment's due process clause is asserted in this case. Absent such a right in issue, granting Petitioners' writ would only confuse, not clarify substantive due process claims in non-custodial circumstances. Petitioners' argue, however, that this case provides an opportunity for the Court to distinguish deliberate indifference from arbitrariness. Given the pleadings, quite the contrary is presented. The Petition represents nothing

more than an effort to reduce substantive due process in the non-custodial context to a precise formula and to depart from the precepts of judicial restraint on substantive due process issues which were confirmed in *Collins.*

Petitioners' third point implores this Court to clarify and to give content to substantive due process issues. This clarification was provided by *Collins.* Petitioners' request is to expand the parameters of due process by creating a medical malpractice constitutional tort. The deliberate indifference/arbitrariness subterfuge is the medium for this agenda. The parameters of due process should not be so expanded.

Whether described in terms of conscience shocking, deliberate indifference or arbitrariness, the "inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercise: reasoned judgement." *Planned Parenthood v. Casey,* 505 ____, 120 L.Ed.2d. 674, 697, 112 S. Ct. ____ (1992). When reasoned judgment is applied to this Court's reticence to expand the concept of substantive due process as articulated in *Collins,* the semantic distinctions drawn by Petitioners' in their appeal to this Court are without merit. Elevating the Hospital's policy to constitutional levels is not warranted. More importantly, dignifying the allegations against Martin as substantive due process assertions is unprecedented.

To bootstrap themselves into a constitutional tort, Petitioners maintain that their bare allegations of criminal deliberate indifference constitute an assertion of due process violations. A careful analysis of the Federal Controlled

Substances Act 42 U.S.C. §§ 801 *et. sec.* demonstrates such claims cannot withstand due process scrutiny.

The use of §1983 to enforce statutory violations is allowed only when the federal statute creates an enforceable right in the plaintiff. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 19, 101, S.Ct. 2615, 69 L.Ed.2d. 435 (1985); *Pennhurst State School,* 451 U.S. 1. Even when an enforceable right is created, enforcement of the right pursuant to a §1983 action will not be allowed when Congress has foreclosed it through the provision of an extensive remedial statutory scheme. *Middlesex County,* 453 U.S. at 28. The Federal Controlled Substances Act creates no enforceable right in the Plaintiffs in this case. Further, the Act's extensive remedial scheme and enforcement procedure indicate that Congress intended to foreclose the use of §1983 to enforce the Act.

Section 1983 does not provide a remedy to enforce all violations of federal law. It provides a remedy only for the deprivation of "rights, privileges and immunities" conferred upon individuals either by the Constitution or federal statute. See, *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. ____, 107 L.Ed.2d. 420, 427. If the statute does not create an enforceable federal right, then a §1983 action will not exist to remedy the statute's violation. The Act does not confer on Plaintiffs here a judicially enforceable federal right.

Plaintiffs have not cited this court to any provision of the Act which grants Plaintiffs or persons similarly situated any rights, governmental entitlements, or benefits. The Act is simply not designed to confer rights on individuals or specified groups. Instead, the Act is a broad criminal statute enacted out of congressional concern regarding the effect of the importation, manufacture, distribution and improper use

of controlled substances on the American public. See, 21 U.S.C. 801(2) (1981). Its purpose was not to confer individual rights but "to deal in comprehensive fashion with the growing menace of drug abuse in the United States." H.R. Rep. No. 91-144, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567. Since the Act confers no enforceable private rights, its violation cannot form the basis of a §1983 action.

Even if an individual right existed under the Act, its comprehensive enforcement scheme would preclude the use of §1983 in this case. It is well established that Congress can foreclose the use of §1983 as a remedy for enforcing a federal statute by creating within the statute a comprehensive enforcement mechanism for the protection of the statutorily created rights. *Middlesex County,* 453 U.S. at 20.

The enforcement and penalties portions of the Act play an integral part in the implementation of the Act's purpose of dealing with drug abuse in American society. "This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 91-1444, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567. "The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treating all persons accused of violations." H.R. Rep. No. 91-1444, 1970 U.S. Code Cong. & Admin. News at 4570.

The Act provides various penalties to be imposed on persons who dispense controlled substances in violation of the Act. These penalties include confinement in prison, 21 U.S.C. §841 and §842(c)(2); the imposition of civil monetary

penalties, 21 U.S.C. §842(c)(1); injunctive relief, 21 U.S.C. §841(f); forfeiture of property, 21 U.S.C. §853; and suspension or revocation of a practitioner's registration to dispense controlled substances, 21 U.S.C. §824. Additionally, the Act contains detailed administrative and enforcement provisions which empower the attorney general to investigate and prosecute certain violations of the Act. 21 U.S.C. §§871-888.

Allowing a private plaintiff to pursue violations of the Act by bringing a §1983 action would most certainly hinder the administration of the Act's enforcement scheme and run contrary to Congressional intent to remedy the nation's drug abuse problem through the formulation of a balanced set of criminal and civil penalties for drug violations. By creating a detailed scheme for the enforcement of drug law violations, Congress has foreclosed the use of §1983 to remedy violations of the Act. Since the Controlled Substances Act confers no judicially enforceable right on the Plaintiffs in this case, and since the Act contains its own detailed enforcement provision, Plaintiffs simply have no §1983 cause of action for the Defendants' alleged violations of the Act. Accordingly, Plaintiff's claims based on the Controlled Substances Act present no fundamental right under the Fourteenth Amendment.

The mere pleading of a violation of the Controlled Substances Act is insufficient to establish a due process claim. Petitioners' third point should be rejected.

4. *The pleadings in this case do not warrant this Court's review.*

Possibly the most compelling reasons to reject Petitioners' writ are the arguments contained in their fourth

reason for granting writ. Here Petitioners allege fraudulent misrepresentations as a basis for their due process claims. Traditional state tort theories are alleged. The true colors of the pleadings are shown.

Contrary to Petitioners' allegations, *Zinermon v. Burch,* 494 U.S. 113 (1990) is distinguishable. The Plaintiff in *Zinermon* was attacking the decision of state officials to use a statutory voluntary commitment procedure to commit and confine Mr. Burch to a state mental hospital. Thus, the defendants in *Zinermon* deliberately decided to infringe upon Mr. Burch's liberty by confining him to a mental hospital and then implemented this governmental decision through the challenged commitment process. *Zinermon* clearly involved both the abuse of governmental power and the deliberate decision to deprive an individual of a constitutionally protected liberty interest. Neither of those factors have been pleaded or are present in this case. *Zinermon* is inapposite. No procedural due process claim can be properly raised by the undisputed facts alleged in the instant suit.

If fraudulent concealment and the illegal practice of medicine are the essence of Plaintiffs' pleadings as alleged in their fourth reason for granting writ, these state law tort claims provide sufficient redress and do not constitute due process assertions. The historical guarantee of due process explained in *Collins* is inconsistent with these traditional tort theories raised by Petitioners. Accordingly, the fourth reason for granting the writ should be denied.

CONCLUSION

Traditional state tort claims should not be elevated to constitutional violations. No fundamental right guaranteed by the due process clause has been alleged. To expand the

parameters of due process under the facts alleged by the pleadings in this case would be inconsistent with the teachings of this Court articulated in *Collins.* The Petition for Writ Certiorari should be denied.

Respectfully submitted,

Don M. Dean
Kelly D. Utsinger
UNDERWOOD, WILSON, BERRY,
STEIN & JOHNSON, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158
(806) 376-5613
(806) 379-0316 - FAX

/s/
Don M. Dean (Counsel of Record)